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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
APPELLANT,

vs.

NATIONAL SURETY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JULY 15, 1935.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 19, 1935.

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IN SUPREME COURT OF TENNESSEE

Davidson Equity

INTERNATIONAL STEEL & IRON COMPANY

v.

NATIONAL CONSTRUCTION COMPANY ET AL.

OPINION—Filed April 6, 1935

The question presented in this case is the liability of the contract surety of a defaulting highway contractor to the unpaid furnisher of material, the contractor having drawn the retainage (ample to cover all the claims) from the Highway Commissioner upon the execution of an indemnity bond. The surety on the indemnity bond has become insolvent. The chancellor held the contract surety liable. The Court of Appeals reversed the chancellor's decree.

In March, 1928, the National Construction Company entered into a contract with the Highway Commissioner to build for the State a bridge over the Tennessee River at Perryville. As required by chapter 74 of the Acts of 1917, the Commissioner took a bond from the contractor with the National Surety Company as surety. This bond was condi-[fol. 5] tioned, following the statute, "upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work."

During the course of the work, the International Steel & Iron Company furnished to the contractor for this project structural and cast steel at an agreed price of $135,020.53. An unpaid balance of $59,833.71 remained due on the steel company's account when the bridge was completed, July 2, 1930. This balance has since been reduced by some $40,000 in a manner not necessary to detail just here.

In due season, after the completion of the contract, the steel company filed notice of its unpaid claim with the

Highway Commissioner according to subsection (e) of section 1, chapter 80, Acts of 1929. The Commissioner had in his hands at that time the sum of $77,099.32 by way of retainage from the principal contract—an amount sufficient to pay all unpaid claims of laborers and materialmen of which notice had been given.

Chapter 74 of the Acts of 1917 provided that the Highway Department should not pay out more than ninety per cent of the contract price on any project before the work was completed and accepted, and provided that, before final settlement, publication should be made that such settle- [fol. 6] ment was about to be made, giving notice to all unpaid laborers, materialmen etc., to file their claims with the department. The statute continued:

"The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

See Southern Construction Co. v. Halliburton, 149 Tenn. 319.

The above quoted provision from the Act of 1917 was stricken by the amendatory act, chapter 80 of the Acts of 1929. In lieu of the quoted provision so stricken the latter statute, in section 1 thereof, substituted the following:

"(a) 'The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow claimants to sue and prove their claims against the contractor or his agent, in some court of competent jurisdiction. In the event suit is brought against the contractor within the said sixty days from the date of the last advertising, by any claimant, [fol. 7] the Department or its officers shall pay the amount of said claim into court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

"(b) 'On the date set for full and final settlement with the contractor, the contractor may make proper refunding

bond to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission, whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.' "

Under authority of subsection (b) above, the Commissioner paid over the retainage to the contractor herein upon the execution by the contractor of a refunding bond with the Equitable Casualty & Surety Company as surety. We have heretofore noted that this surety became insolvent but after this suit was brought, as the result of negotiations between the receivers of said surety company and the Commissioner, approved by the chancellor, a new bond in the sum of $40,000 with a solvent surety was substituted for the first refunding bond. The original refunding bond was for $77,099.32. We assume it was made to appear to the court below that the insolvent surety on the original refunding bond would be able to pay it debts in about the same proportion that the substitued bond bore to the origi-
[fol. 8] nal bond.

The chancellor rendered a decree for the amount of the steel company's claim, less a credit of $1240 to which he found the contractor entitled, the decree running against the contractor and the National Surety Company, the contract surety. The Chancellor, however, directed the Consolidated Indemnity & Insurance Company, the substitute refunding bond surety, to pay into court the sum of $40,000, the penalty of the bond executed by it, and this sum was to be credited on the judgment against the contract surety.

The steel company contends that the release of the retainage by the Commissioner to the contractor was unauthorized, in violation of the steel company's contract rights, and having been made without its knowledge or consent, did not release the contract surety from liability for the steel company's claim. We are referred to a number of cases considering bonds similar to the one executed by the contract surety herein. Among others, decisions of this court in Cass v. Smith, 146 Tenn. 218, and Bristol v. Bostwick, 146 Tenn. 205. These bonds taken by governmental agencies are dual in nature. They undertake to secure to the obligee the faithful performance of the public work and also, by statutory requirement, undertake to secure to laborers and materialmen payment of their claims against

the contractor. The cases cited rule that a breach of the contract, such as a substantial departure from the plans [fol. 9] or a dispersal of the retainage, although it may release the surety as to the direct obligee, does not relieve the obligation of the surety to laborers and materialmen not participating in the deviation. In none of the cases, however, did the governmental agency in such deviations act under direct legislative authority in paying out the retainage and in none of the cases was other equivalent security provided for laborers and materialmen.

The court has considered subsections (a) and (b) of section 1 of chapter 80 of the Acts of 1929 in several recent cases. Hurst v. Dawson Bros. & Beaver, 167 Tenn. 572; Campbell v. Cresap, 166 Tenn. 75; Equitable Casualty & Surety Co. v. Jackson, 163 Tenn. 54. In these cases it was said that (b) offered the contractor an alternative and permitted him by executing a refunding bond to withdraw his retainage and to avoid the tie-up of the retainage that otherwise would follow litigation over a disputed claim. The refunding bond, or indemnity bond, is substituted for the retainage.

It must have been contemplated that the release of the retainage by the Highway Commissioner, either under (a) or under (b)—the retainage being adequate to cover litigated claims—would discharge the surety on the contract bond from liability to laborers and materialmen. Otherwise the validity of (a) and (b) could scarcely be sustained. [fol. 10] Such retainage stood between the contract surety and such liability. The surety would not be called on by the unpaid claimants, ordinarily, if they could be paid out of the retainage. If the surety were required to pay such claimants, the surety would be subrogated to their rights against the retainage. The surety's rights with respect to the retainage, being contract rights, could not be taken away unless adequate security was substituted for the retainage and the Act of 1929 offers no such substitute to the contract surety.

On the other hand, the steel company had no contract rights against the retainage, or against the contract surety, or against the Highway Department. All such rights of the steel company arose under chapter 74 of the Acts of 1917 and under chapter 80 of the Acts of 1929 and were purely statutory. Properly speaking, these were not rights at all

but were remedies afforded the materialman by these statutes to enable him to enforce his rights arising under his agreement with the general contractor.

In Southern Construction Co. v. Halliburton, 149 Tenn. 319, we noted that the statutes requiring contractors on public works to execute bonds for the protection of laborers and materialmen had the same general purpose as the mechanic's lien statutes. The beneficiaries of the legislation are given a lien under private contracts, recourse on the bond under public contracts.

Many cases hold that a mechanic's lien being only a remedy afforded by statute for the collection of a debt [fol. 11] arising out of contract, and not a vested right, may be abolished or modified by statute without impairing the obligation of the contract. Bangor v. Goding, 35 Me. 73, 56 Am. Dec. 688; Hanes v. Wadey, 73 Mich. 178, 2 L. R. A. 498; Bolton v. Johns, 5 Pa. St. 145, 47 Am. Dec. 404; Wilson v. Simon, 91 Md. 1, 80 Am. St. Rep. 427.

Other cases take the view that a mechanic lienor cannot be so divested by a repeal of the statute under which his lien accrued; that he has a vested interest in this remedy. Tell v. Woodruff, 45 Minn. 10; Streubel v. Milwaukee, etc. R. Co., 12 Wis. 71; Warren v. Woodard, 70 N. C. 382; Weaver v. Sells, 10 Kan. 619.

We have not undertaken above to cite all the cases on either side of this controverted question. This particular controversy has not arisen in this court and is not presented by the case before us.

If we concede that the materialman's lien in the one instance, or his recourse on the bond in the other instance, enters into his contract and is a part thereof, and that a remedy so embraced cannot be impaired without impairing the obligation of the contract, still our construction of chapter 80 of the Acts of 1929 does not bring that statute into [fol. 12] any constitutional difficulty. We construe the statute as regulating, after its passage, the procedure to be followed by all parties in respect to the final settlement of every highway contract, whether the contract itself was made before or after the enactment of chapter 80 of the Acts of 1929.

The original Act, chapter 74 of the Acts of 1917, as its title indicated, undertook "to confer upon the State Highway Department certain powers with respect to the distri-

bution and expenditure of said entire (highway) fund and to impose certain duties and place certain restrictions upon the said State Highway Department with respect thereto." The amendatory Act, chapter 80 of the Acts of 1929, further regulated the expenditure of the highway funds in settlement for completed projects when there were unpaid laborers and materialmen. Excepting one subsection dealing with the qualifications of a general contractor, every other substantial provision (eleven lettered subsections) of the Act of 1929 relates to procedure to be followed when a contract is finished and there are outstanding claims for labor and material. The procedure to be followed by the Commissioner, the contractor, and the claimants is detailed. The Act of 1917 left nearly all of this to implication.

[fol. 13] The Act of 1929 declared that its provisions should "take effect from and after its passage." That is, the procedure outlined should be thereafter followed. The Act dealt with procedure to be followed upon the completion of all highway contracts, irrespective of the date of any contract. Nothing to the contrary can be gathered from any portion of the amendatory statute.

Chapter 80 of the Acts of 1929 thus interpreted is retrospective only in the sense that it may be said to have altered the remedies previously existing for enforcing rights arising under earlier contracts. On its face the statute is retrospective to that extent.

It is the general rule that, where a statute deals with procedure only, it applies prima facie to rights of action that have accrued and indeed to pending actions. Lewis' Sutherland Statutory Construction, Second Edition, Vol. 2, p. 1226, 25 R. C. L. 791, 59 C. J. 1173.

The constitutional rights of one whose existing remedy is thus taken away are not infringed if the procedural statute provides him a new and effective remedy instead. This is true even though the new remedy is not so convenient.

In Collins v. East Tennessee, V. & G. R. Co., 56 Tenn. 841, the court said:

[fol. 14] "It is a general rule, that a Statute is to operate prospectively, unless upon its face it imports a retrospective operation; but it is not every retrospective law that is objectionable in a Constitutional sense. It is said that a vested right of action is property, just as tangible things are, and is protected from any arbitrary interference by

the Legislature; but this doctrine is referable to such rights of action as spring from contracts or from the Common Law. Cooley, 362. But the right to a particular remedy, says the same authority, is not a vested right. Id., 361. The State has complete control over the remedies of its citizens in the Courts. It may give a new and additional remedy for a right already in existence—or may abolish old and substitute new remedies."

In Lunati v. Building & Loan Ass'n, 167 Tenn. 161, it was said:

"But the Constitution does not forbid a change in the remedy which does not deprive one of the contractual right nor prevent enforcement of the right. If the right to enforce is left effective, the Constitution is not violated. State v. Bank, 3 Baxt., 395. * * * While they (complainants) have a right to enforce their contract and that right cannot be impaired, they have no vested right in a particular remedy."

Other decisions of this court to like effect are reviewed [fol. 15] in the two opinions from which we have quoted.

The Supreme Court of the United States has announced the same rule. Tennessee v. Sneed, 96 U. S. 69; Fourth National Bank v. Francklyn, 120 U. S. 764.

By the Act of 1917 complainant steel company was given recourse on the retainage and on the contract bond to secure its rights arising under its engagement with the general contractor. For these remedies the Act of 1929 substituted recourse on an indemnity or refunding bond.

It seems to us the substitute remedy was adequate and effectual, as well as conventional. We suppose that statutes exist everywhere to permit the release of property taken under the levy of an execution or attachment upon the execution of a good bond by the property owner. We have not heard the validity of such statutes questioned. We see no impropriety therefore in a statute permitting the general contractor to secure the release of his retainage upon the execution of a good bond.

Likewise the substitution of the refunding or indemnity bond for the contract bond seems unobjectionable. In either case, the bond would have to be approved by the Highway Commission. The protection offered by one bond [fol. 16] would ordinarily be as good as the protection of-

fered by the other. As a rule, bonds from surety companies are taken.

Owing to the economic stress of recent years, the surety company executing the contract bond and the surety company executing the refunding bond both became involved in financial difficulties. For that reason the complainant steel company is here seeking to hold both surety companies.

In our opinion, for the reasons heretofore stated, the surety on the contract bond has been discharged from liability and the decree of the Court of Appeals is accordingly affirmed.

Green, C. J.

Mr. Justice McKinney dissents.

[fol. 17] IN SUPREME COURT OF TENNESSEE

[File endorsement omitted]

[Title omitted]

DISSENTING OPINION—Filed April 6, 1935

I concur with the Chancellor and the Court of Appeals in holding that the Act of 1929 should be construed as prospective, otherwise it would be unconstitutional as impairing the obligation of a contract. Upon the strength of the bond executed by the National Surety Company complainant furnished steel of the value of $135,000. Under the majority opinion the legislature can destroy this obligation by authorizing the Commissioner of Highways to substitute other security, which, as in this cause, was worthless, and upon which complainant might not have been willing to furnish this large quantity of material. This, in my opinion, extends the rule of remedies further than is justified under elemental principles of contract. The National Surety Company, for a paid consideration, said to complainant if you will furnish this material we will guarantee that you will receive your money. Upon this agreement the Surety Company now says that it is released because, [fol. 18] without the knowledge or consent of complainant, another agency substituted other surety in its stead. Treating the Act of 1929 as prospective, it is valid, and those who

contract subsequent to its enactment would be bound by its provisions. But to give it a retrospective application certainly causes complainant to lose a large sum of money which the National Surety Company guaranteed the payment of.

I, therefore, respectfully dissent from the majority opinion.

McKinney, J.

[fol. 19] IN SUPREME COURT OF TENNESSEE

Davidson Equity

Court of Appeals affirmed

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION CO. ET AL

DECREE—April 6, 1935

This cause coming on further to be heard upon a transcript of the record from the Chancery Court of Davidson County, petition for certiorari and reply thereto to the action of the Court of Appeals, briefs and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Court of Appeals there is no error.

It is therefore ordered and decreed by the Court that the decree of the Court of Appeals be in all things affirmed, and that the decree of the Chancellor be reversed, and the bill dismissed as to the National Surety Co. and that the International Steel and Iron Co. principal and Louis Leftwich and Cecil Sims, sureties, will pay all of the costs of this cause, for which let fi fa issue.

[fol. 20] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION FOR APPEAL—Filed June 10, 1935

Now comes International Steel and Iron Company, appellant, and says that on April 6th, 1935, the Supreme Court of the State of Tennessee, it being the highest court

of said state in which a decision could be had in said cause between the above named parties, rendered final judgment herein in favor of National Surety Company, one of the appellees, and against International Steel and Iron Company, appellant, in which final judgment in said cause certain errors were committed to the prejudice of International Steel and Iron Company, appellant, all of which will more in detail appear in the assignment of errors which is filed with this petition.

[fol. 21] That in the record and proceedings it will appear there was drawn into question the constitutional validity of a certain statute of the State of Tennessee, to-wit: Chapter 80 of the 1929 Public Acts of Tennessee, on the ground that said statute as interpreted and applied by the Supreme Court of Tennessee in this cause, released and extinguished the obligation of a preexisting contract between appellant and National Surety Company, appellee, and released and extinguished the means which at the time of the creation of said contract the law afforded for its enforcement; and said statute therefore was in violation of Section 10, Article 1, of the Constitution of the United States.

Wherefore International Steel and Iron Company, appellant, prays that upon the execution by it of a proper bond duly approved, appeal may be granted in its behalf in the said cause to the Supreme Court of the United States for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States at Washington.

This June 10th, 1935.

International Steel and Iron Company, F. M. Bass, Louis Leftwich, by Cecil Sims, Counsel.

[fol. 22] Appeal is hereby allowed, as prayed, upon the International Steel and Iron Company making bond as required by law in the sum of $1,000.00.

This June 10, 1935.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

[fol. 23] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENTS OF ERROR ACCOMPANYING PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

International Steel and Iron Company, appellant in this cause, in connection with its petition for appeal this day filed, to-wit: June 10th, 1935, shows the following errors which it avers occurred in the proceedings in this cause and on the trial thereof, and in the opinion and judgment of the Supreme Court of the State of Tennessee, upon which it relies to reverse the final judgment entered herein as appears of record.

I

The Supreme Court of Tennessee erred in holding and decreeing that Chapter 80 of the 1929 Public Acts of Tennessee, as construed and applied in this cause, was valid and not in violation of the Constitution of the United States, said Act being invalid and in violation of Section 10, Article [fols. 24-51] 1, of the Constitution of the United States because:

(a) Said Act as construed by the Court and applied to appellant in this cause impaired the obligations of a preexisting contract between appellant and appellee in that it impaired, released and destroyed the means afforded by law for the enforcement of said contract at the time of its creation.

(b) Said Act as construed by the Court and applied to appellant in this cause impaired the obligations of a preexisting contract between appellant and appellee in that it impaired, released and discharged the obligations of said contract without the consent of appellant.

II

The Supreme Court of Tennessee erred in holding and decreeing that Chapter 80 of the 1929 Public Acts of Tennessee was applicable to the preexisting contract between appellant and appellee, and in failing and declining to hold said Act to be prospective and not retroactive.

For which errors the appellant, International Steel and *Ice* Company, prays that said final judgment in the Supreme Court of the State of Tennessee, dated April 6th, 1935, in the above cause be reversed, and that appellee, National Surety Company, be taxed with the costs.

This June 10th, 1935.

International Steel and Iron Company, F. M. Bass, Louis Leftwich, by Cecil Sims, Counsel.

[fol. 52] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER ALLOWING APPEAL

This cause came on to be heard upon the petition of International Steel and Iron Company, appellant, in this cause, for an appeal to the end that said cause may be transferred, as provided by law, to the Supreme Court of the United States for final determination.

And it appearing to the Court that the International Steel and Iron Company has in proper manner challenged the constitutional validity of a certain statute of the State of Tennessee on the ground that it is repugnant to the Constitution of the United States, and this Court having held by opinion and order duly filed in this cause that said statute is valid and enforcible and applicable to said appellant in this cause, and International Steel and Iron Company [fol. 53] having filed an appeal bond in the sum of One Thousand Dollars, satisfactory to the Chief Justice of this Court.

It is, therefore, ordered, adjudged and decreed that an appeal as prayed be, and the same hereby is, allowed to the Supreme Court of the United States.

It is further ordered that a transcript of the record, proceedings, papers, opinion and judgment of this Court shall be prepared and transmitted by the Clerk of the Supreme Court of Tennessee to the Supreme Court of the United States at Washington, in the manner and form provided by law, so that he shall have the same in said Court within forty days of this date, to the end that said Court may inspect the same and do what according to law should be done.

This the 10 day of June, 1935.

Grafton Green, Chief Justice of the Supreme Court of the State of Tennessee.

[fols. 54-58] Bond on Appeal for $1,000.00 approved June 10, 1935, omitted in printing.

[fol. 59] Citation in usual form showing service on Wm. Hume omitted in printing.

[fol. 60] [Caption omitted]

[fol. 61] IN CHANCERY COURT OF DAVIDSON COUNTY

No. 42476

INTERNATIONAL STEEL & IRON COMPANY, a Corporation Organized under the Laws of the State of Indiana, and a Resident of said State, Complainant,

vs.

NATIONAL CONSTRUCTION COMPANY, a Corporation, Organized under the Laws of the State of Florida, and a Nonresident of Tennessee; National Surety Company, a Corporation Organized under the Laws of a Foreign State but Having an Office and Agent in Davidson County, Tennessee; R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, a Resident of Davidson County, Tennessee, Equitable Casualty & Surety Company, a Corporation Organized under the Laws of the State of New York and Having a Resident Agent in Davidson County, Tennessee, Defendants

ORIGINAL BILL—Filed September 12, 1930

To the Honorable James B. Newman, Chancellor, Holding Part Two of the Chancery Court of the Seventh Division of the State of Tennessee at Nashville:

Your complainant respectfully shows to the Court as follows:

I

The International Steel & Iron Company is a corporation duly organized under the laws of the State of Indiana, with its principal office and place of business in Evansville [fol. 62] in said State of Indiana, and has heretofore filed its charter for domestication in the State of Tennessee and

has been duly authorized and licensed to do business in said State.

The defendant National Construction Company is a corporation organized under the laws of the State of Florida and has its principal office at Miami in said State of Florida, and has heretofore filed its charter and has been duly domesticated and licensed to do business in Tennessee.

The defendant National Surety Company is a corporation organized under the laws of the State of New York, according to complainant's information, but at all events is a foreign corporation but has been domesticated and licensed to do business in Tennessee and has a resident agent in Davidson County, Tennessee.

Defendant R. H. Baker is the duly appointed and acting Commissioner of Highways & Public Works of the State of Tennessee, and is a citizen and resident of Davidson County, Tennessee.

Defendant Equitable Casualty & Surety Company is a corporation organized under the laws of the State of New York and has duly filed its charter and been domesticated and qualified to do business in the State of Tennessee, and has a resident agent in Davidson County, Tennessee.

[fol. 63] II

On March 12, 1928, defendant National Construction Company entered into a contract with the State of Tennessee, through its Department of Highways & Public Works, for the construction of a certain bridge across the Tennessee River, known as the Perryville Bridge, and more particularly as Special Bridge Project No. 4, Section 8, Decatur and Perry Counties of State Highway No. 23, as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways and Public Works, and as provided by law the said National Construction Company entered into a certain bond, also dated March 12, 1928, binding itself unto the State of Tennessee and its Department of Highways & Public Works in the penal sum of Two hundred Eighty-Five Thousand Nine Hundred Seventy-Six Dollars and Twenty Cents ($285,976.20), guaranteeing the performance of said contract, which bond was duly executed by the defendant National Surety Company as surety thereon, and by express terms the said National Construction Company and its said

surety, National Surety Company, guaranteed the payment on the part of the principal contractor for all materials, supplies and labor furnished and used in the construction of said bridge, said bond having been made pursuant to the statutes of the State of Tennessee and being expressly for the benefit of such parties as furnished materials, sup- [fol. 64] plies and labor to said contractor in the construction of said bridge. The original of said contract between the State of Tennessee and the defendant National Construction Company for the construction of said bridge and the original of said bond are now in the hands of the defendant R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, and also copy is in possession of the defendants National Construction Company and National Surety Company and hence an original can not be filed by complainant but true copies thereof will be procured before the hearing and complainant calls upon the defendants to produce the originals.

III

Shortly thereafter and on or about March 22, 1928, complainant entered into a contract under the terms and provisions of which it agreed to furnish to the said principal contractor, to wit, National Construction Company, certain structural and cast steel, including sheet lead and structural steel spans for the bridge in question, for which the said defendant National Construction Company agreed to pay your complainant the total sum of One Hundred Thirty-five Thousand Thirty Dollars and Fifty-three Cents ($135,020.53), said original contract, if required, will be produced [fol. 65] on or before the hearing. Complainant shows that pursuant to the terms and provisions of said contract it duly fabricated, delivered and furnished to said defendant the said structural and cast steel and sheet lead, all of which were in fact used in the construction of said bridge, and complainant completed and erected the said steel spans out of the materials aforesaid in accordance with its contract aforesaid, for which complainant was paid from time to time certain sums aggregating a total credit of Seventy-five Thousand One Hundred Eighty-six Dollars and Eighty-two Cents, ($75,186.82), leaving a balance due and unpaid on its said contract in the sum of Fifty-Nine Thousand Eight Hundred Thirty-three Dollars and Seventy-one Cents

($59,833.71) which amount is now just, due and owing to your complainant and there are no offsets or counterclaims against the same. Complainant files herewith an itemized statement of said account showing all credits thereon, leaving the balance aforesaid, said statement being made Exhibit "A" hereto.

Complainant has made demand upon the defendants National Construction Company and National Surety Company for the payment of the sums due it as aforesaid but said defendants have failed, refused and neglected to make payment thereof or any part thereof, and same is now past due and unpaid, and complainant is entitled to interest thereon from and after the date of the completion of said [fol. 66] work.

IV

On the completion of said work by said contractor, the Commissioner of Highways & Public Works, according to law, advertised for claimants to file their claims against said contractor, which advertisement was published in Parsons' News Leader, published at Parsons in Decatur County, Tennessee, and also in the Perry Countian, published at Linden in Perry County, Tennessee, the last publication of which was made on August 20, 1930, and complainant duly filed its claim for the amount hereinabove shown to be due to it, with the proper number of copies of said claim as required by law, and with good and lawful bond as provided by law, with the Department of Highways & Public Works of the State of Tennessee.

Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eighty-two Cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee a refunding bond, as pro-
[fol. 67] vided by law, with the defendant Equitable Casualty & Surety Company as surety thereon in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways & Public Works paid over said retained funds to the principal contractor and now holds said refunding bond for the benefit

of claimants who had filed their claims with said Department of Highways & Public Works.

Complainant, therefore, pursuant to the statutes of the State of Tennessee, brings this suit, and, premises considered, prays:

1st. That the defendant be made such by issuance and service of process on the defendant as provided by law, requiring them to appear and answer this bill at an early rule day of the Court but their oaths to their answers are waived.

2nd. That on the hearing complainant have a decree against the defendants National Construction Company, National Surety Company, and Equitable Casualty & Surety Company for the full amount herein sued on, to wit, $59,833.71, with lawful interest thereon as may be right and proper and for the costs of this cause.

3rd. That complainant have such other, further and general relief as it may be entitled to under the equities of the [fol. 68] cause.

Paul L. Williams, Louis Leftwich, Bass, Berry & Sims, Solicitors for Complainant.

We are sureties for the costs:

Louis Leftwich, Cecil Sims.

[fol. 69] EXHIBIT "A" TO ORIGINAL BILL

(Statement)

Evansville, Indiana, 7-31-30.

International Steel & Iron Co.

National Construction Company—

1928.			
Aug. 22	Ladder rungs, etc.	$49.00	
1929.			
Nov. 1	Plates & Bolts	41.54	
Dec. 18	" "	10.37	
1930.			
July 23	Bridge	$134,919.62	
			$135,020.53
1929.	Credit:		
May 23	Cash	648.58	
May 31	Cash	236.87	
July 11	Cash	169.98	

($59,833.71) which amount is now just, due and owing to your complainant and there are no offsets or counterclaims against the same. Complainant files herewith an itemized statement of said account showing all credits thereon, leaving the balance aforesaid, said statement being made Exhibit "A" hereto.

Complainant has made demand upon the defendants National Construction Company and National Surety Company for the payment of the sums due it as aforesaid but said defendants have failed, refused and neglected to make payment thereof or any part thereof, and same is now past due and unpaid, and complainant is entitled to interest thereon from and after the date of the completion of said [fol. 66] work.

IV

On the completion of said work by said contractor, the Commissioner of Highways & Public Works, according to law, advertised for claimants to file their claims against said contractor, which advertisement was published in Parsons' News Leader, published at Parsons in Decatur County, Tennessee, and also in the Perry Countian, published at Linden in Perry County, Tennessee, the last publication of which was made on August 20, 1930, and complainant duly filed its claim for the amount hereinabove shown to be due to it, with the proper number of copies of said claim as required by law, and with good and lawful bond as provided by law, with the Department of Highways & Public Works of the State of Tennessee.

Complainant alleges that on the day set for final settlement the said Department of Highways & Public Works had retained from the funds due the said principal contractor the sum of Seventy-seven Thousand Sixty-nine Dollars and Eighty-two Cents ($77,069.82), and on September 3, 1930, the defendant National Construction Company executed to the Department of Highways & Public Works of the State of Tennessee a refunding bond, as pro- [fol. 67] vided by law, with the defendant Equitable Casualty & Surety Company as surety thereon in the penal sum of the amount of said retainage hereinabove mentioned, whereupon the said Department of Highways & Public Works paid over said retained funds to the principal contractor and now holds said refunding bond for the benefit

of claimants who had filed their claims with said Department of Highways & Public Works.

Complainant, therefore, pursuant to the statutes of the State of Tennessee, brings this suit, and, premises considered, prays:

1st. That the defendant be made such by issuance and service of process on the defendant as provided by law, requiring them to appear and answer this bill at an early rule day of the Court but their oaths to their answers are waived.

2nd. That on the hearing complainant have a decree against the defendants National Construction Company, National Surety Company, and Equitable Casualty & Surety Company for the full amount herein sued on, to wit, $59,833.71, with lawful interest thereon as may be right and proper and for the costs of this cause.

3rd. That complainant have such other, further and general relief as it may be entitled to under the equities of the [fol. 68] cause.

Paul L. Williams, Louis Leftwich, Bass, Berry & Sims, Solicitors for Complainant.

We are sureties for the costs:

Louis Leftwich, Cecil Sims.

[fol. 69] EXHIBIT "A" TO ORIGINAL BILL

(Statement)

Evansville, Indiana, 7-31-30.

International Steel & Iron Co.

National Construction Company—

1928.			
Aug. 22	Ladder rungs, etc.	$49.00	
1929.			
Nov. 1	Plates & Bolts	41.54	
Dec. 18	" "	10.37	
1930.			
July 23	Bridge	$134,919.62	
			$135,020.53
1929.	Credit:		
May 23	Cash	648.58	
May 31	Cash	236.87	
July 11	Cash	169.98	

National Construction Company—Continued.

1929.	Credit:		
Aug. 12	Cash	191.23	
Sept. 20	Contra. Naill & Naill	22.00	
Aug. 9	" " "	427.35	
" 9	" " "	6.50	
Nov. 11	" " "	16.50	
Nov. 15	" " "	71.27	
" 9	" " "	27.58	
" 8	" " "	26.62	
" 7	" " "	23.20	
Dec. 7	" " "	4.95	
Oct. 15	" " "	119.37	
Dec. 27	" " "	2.97	
Nov. 19	Cash	28,503.94	
1930.			
Jan. 11	Contra. Naill & Naill	110.00	
Feb. 7	" " "	75.00	
Mar. 22	" " "	4.41	
" 21	" " "	5.04	
June 26	" " "	14.43	
" 30	" " "	10.00	
Mar. 22	Cash	44,469.03	
			75,186.82
	Balance		$59,833.71

[fol. 70] In Chancery Court of Davidson County

[Title omitted]

Petition of R. H. Baker, Commissioner, Etc.—Filed October 4, 1930

Your petitioner, R. H. Baker, duly qualified, appointed and acting Commissioner of the Department of Highways and Public Works of the State of Tennessee, represent to the Court that the National Construction Company was the principal contractor for the construction of State aid bridge, highway and approaches, Project No. SBP #4-A in Perry and Decatur Counties, Tennessee;

Your petitioner further shows to the Court that final settlement was made with said contractor on September 4, 1930; that under Chapter 74, of the Acts of 1917, and Acts amendatory thereto, in making said final settlement with said contractor, a refunding bond was by them executed covering the amount of all claims filed with the Department of Highways and Public Works of the State of Tennessee against said project, including the claim upon which this suit was brought; certified copy of said Refunding Bond is

[fol. 71] hereto attached, made a part of this petition and marked Exhibit "A".

Your petitioner further shows to the Court that claimant, International Steel & Iron Company, filed with the Department of Highways and Public Works of the State of Tennessee, a claim in the amount of $59,833.71, for materials, supplies and labor furnished and used in the construction of the bridge over the Tennessee River, known as the Perryville Bridge on S. B. P. #4-A; certified copy of said claim is hereto attached, made a part of this petition and marked as Exhibit "B"; a claimant's bond covering said claim was also filed with the Department of Highways and Public Works of the State of Tennessee, as required by law, certified copy of which is hereto attached, made a part of this petition and marked Exhibit "C".

Now having fully answered as required by Chapter 80, Public Acts of 1929, your petitioner R. H. Baker, Commissioner of the Department of Highways and Public Works of the State of Tennessee, prays that this suit be dismissed as to him.

R. H. Baker, Commissioner of the Department of Highways and Public Works of the State of Tennessee. L. D. Smith, Attorney General. Jno. L. Neely, Assistant Attorney-General.

[fol. 72] EXHIBIT "A" TO PETITION OF R. H. BAKER, COMMISSIONER—Filed October 4, 1930

Refunding Bond

We, National Construction Company, as Principal, and Equitable Casualty & Surety Company, as Surety, acknowledge ourselves indebted and firmly bound unto the State of Tennessee, in the sum of $77,099.32, Seventy-Seven Thousand and Ninety-Nine and 32/100, Dollars.

The condition of the above obligation is such that:

Whereas, the Department of Highways and Public Works of the State of Tennessee, hereinafter called the "Department" has this day made final settlement with the National Construction Company contractor on Project No. S. B. P. 4, —being the construction of a steel and concrete bridge over Tennessee River known as "Perryville Bridge" hereinafter called the contractor, by paying said contractor $77,099.32, Seventy-Seven Thousand Ninety-Nine and 32/100,

the amount of the final retainage heretofore withheld, and

Whereas, there has been filed with said Department the following listed claims against said contractor on said project, to wit:

[fol. 73] Longstaff Orm Lumber Company	$ 2,188.52
C. A. Livingstone	90.00
Tennessee Mill & Mine Supply Company	499.92
Henry A. Petter Supply Co.	2,624.92
Chicago Pneumatic Tool Co.	688.22
Manhattan Rubber Mfg. Co.	94.40
George A. McDonald	1,136.87
J. E. Reynolds	375.00
Hassell Lumber Company	2,733.65
W. R. Dennison	243.80
C. G. Kershaw Contracting Company	300.00
Williams & Guinn	73.50
International Steel & Iron Co.	59,833.71
Day-Evans Iron Works, Inc.	110.16
Hermitage Portland Cement Co.	242.80
J. K. Martin	105.00
Standard Oil Co. of La.	704.08
J. O. Ashman	223.00
Sverre Olsen	1,242.85

Now, therefore, if the said National Construction Company shall pay such of the above listed claims as may be adjudicated just, proper and legal claims against it on said Project, or failing to pay such claims, shall refund to the State of Tennessee the $77,099.32 this day paid it with in-
[fol. 74] terest, then this obligation to be void, otherwise, to remain in full force and effect.

This obligation is executed under the provision of Chapter 80, Acts of 1929, and upon full understanding by all parties that it stands in place and in lieu of said $77,099.32, the retainage this day paid the contractor; that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said Project, as fully as if the retainage had not been paid to the contractor but had been withheld by the Department, and said claim-

ants or any of them, in the event their claims are adjudicated just, proper and legal claims against said Project, are authorized by all parties hereto to bring suit on this bond, provided, the liability of the surety hereto shall not exceed $77,099.32, the amount of the retainage this day paid to the contractor, together with such interest and cost as the Court may allow.

This the 3rd day of September, 1930.

National Construction Company, by John A. McDonald, President, Principal. Equitable Casualty & Surety Company, Surety, by Howard Dye, Attorney-in-fact.

[fol. 75] EXHIBIT "B" TO PETITION OF R. H. BAKER, ETC.— Filed Oct. 4, 1930.

Evansville, Indiana, 7-31-30.

International Steel & Iron Co.

National Construction Co.—

1928.			
Aug. 22	Ladder rungs, etc.	$49.00	
1929.			
Nov. 1	Plates & Bolts	41.54	
Dec. 18	" "	10.37	
1930.			
July 23	Bridge	$134,919.62	
			$135,020.53
1929.	Credit:		
May 23	Cash	648.58	
May 31	Cash	236.87	
July 11	Cash	169.98	
Aug. 12	Cash	191.23	
Sept. 20	Contra. Naill & Naill	22.00	
Aug. 9	" " "	427.35	
" 9	" " "	6.50	
Nov. 11	" " "	16.50	
Nov. 15	" " "	71.27	
" 9	" " "	27.58	
" 8	" " "	26.62	
" 7	" " "	23.20	
Dec. 7	" " "	4.95	
Oct. 15	" " "	119.37	
Dec. 27	" " "	2.97	
Nov. 19	Cash	28,503.94	
1930.			
Jan. 11	Contra. Naill & Naill	110.00	
Feb. 7	" " "	75.00	
Mar. 22	" " "	4.41	
" 21	" " "	5.04	
June 25	" " "	14.43	
" 30	" " "	10.00	
Mar. 22	Cash	44,469.03	
			75,186.82
	Balance		$59,833.71

[fol. 76] International Steel & Iron Company

Evansville, Ind., 7-23-30.

Sold to National Construction Company, Inc., 812-814 Barnett National Bank Building.
Address: Jacksonville, Florida.
Address: Perryville, Tennessee.
Via Freight and Barge.
Our Order No. 2-1933.
Date Entered: 3-22-28.
Date of Buyer's Order: 3-19-28.
Terms: See below.

Furnish, fabricate, deliver, erect and paint approximately 1,974,500# of Structural and Cast Steel, including Sheet Lead, for structural steel spans for a bridge across the Tennessee River, known as the Perryville Bridge or more particularly as Special Bridge Project No. 4, Decatur and Perry Counties on State Highway No. 23, as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways and Public Works, it being understood that we be given adequate storage and working space gratis.

For the sum of —— 30819# @ $0.064 per lb. net $1,972.42
(six and four-tenth cents per pound, net)
Furnish approximately 29,347# of Expansion Devices for concrete approach, including Copper Plates,
For the sum of —— 2,077,300# @ $0.064 per lb. 132,947.20

(six and four-tenths cents per pound, net) net, freight allowed to Perryville, Tennessee railroad station $135,919.62

[fol. 77] No curb bars, Cast Iron Drains or Reinforcing included.

Completion—It is understood that we will be notified twenty days prior to the time to begin the erection of the Structural Steel and Steel Castings for the structural steel spans and will complete the erection within one hundred

and fifteen (115) working days, it being understood that the construction of the superstructure is ready for us to go ahead with the erection without interruption, and when local conditions are favorable for such erection.

Shipment—It is understood that we will make shipment of material for Expansion Devices upon thirty days' notice.

Terms of Payment—It is understood the terms of payment between you and the State of Tennessee shall govern, except that the dates of payment named shall be extended for ten days.

International Steel & Iron Company

Evansville, Indiana, 8-22-28.

Sold to National Construction Company, Inc.
Address: Perryville, Tennessee.
Ship to: Same.
Address: Perryville, Tennessee.
Via: Freight.
[fol. 78] Our Order No. 2-2818.
Date Entered: 8-8-28.
Date of Buyer's Order: 8-3-28.
Buyer's Order No. 1791.
Terms: Net Cash 30 days.

Re: Perryville Bridge

Tenn. S. B. P. No. 4

Furnish according to our special drawing #38230:

67 Ladder rungs made of 1" diameter round rods.
2 Hand grips made of 1" diameter plain round rods.

These to be hot galvanized in accordance with standard specifications. These rungs will be bent in accordance with our drawing.

For the sum of $49.00

Net. Present rate of freight allowed to Perryville, Tennessee, railroad station.

[fol. 79] International Steel & Iron Company

Evansville, Ind. 12-18-29.

Sold to National Construction Company, Inc., 812-814 Barnett National Bank Building.
Address: Jacksonville, Florida.
Ship to Same.
Address: Perryville, Tennessee.
Via Freight, Prepaid.
Our order No. 2-5879.
Date entered: 12-19-29.
Date of Buyer's Order, 12-17-29.
Terms: Net Cash, 30 days.

Furnish for Perryville, Tennessee Bridge Job:

1—15 x ½" Steel Expansion Plate 1' 6" long.
2— ditto 1' 2" "
3— " 0' 10" "

Above plates to be punched with countersunk holes. No Copper plates or bolts included.

For the sum of —— 162# @ $.064 per pound $10.37
Net. Present rate of freight prepaid to Perryville, Tennessee Railroad Station.

[fol. 80] International Steel & Iron Company

Evansville, Ind., 11-1-29.

Sold to National Construction Co., Inc.
Address: Perryville, Tennessee.
Ship to Same.
Address: Perryville, Tennessee.
Via Freight.
Our order No. 2-5654.
Date entered: 10-28-29.
Date of Buyer's Order, 10-25-29.
Buyer's Order No. 68-G.
Terms: Net Cash, 30 days.

Furnish the following Plates and Bolts for Perryville Bridge Job:

4—10 x 15" Steel Plates,
9—14 x 15" do

2—18 x 15" " .
4—10 x 15" Copper Plates,
2—14 x 15" do
3—18 x 15" "
100—¾ x 12" Countersunk Bolts
649# @ 0.064 per lb. Net, freight allowed Perryville, Tennessee $41.54

STATE OF TENNESSEE,
County of Davidson:

William J. Walker, being first duly sworn, upon his oath says, that he is Treasurer of the International Steel & Iron [fol. 81] Company, an Indiana Corporation, and makes this affidavit for and on behalf of said corporation; that the National Construction Company, of Atlanta, Ga., is justly and truly indebted to the International Steel & Iron Company in the sum of Fifty-Nine Thousand, Eight Hundred Thirty-Three Dollars and Seventy-One Cents ($59,833.71) a statement of which account, showing all debits and credits is hereto attached, made a part hereof, and marked Exhibit "A"; that no part of said account has been paid except as shown by the credits indicated; that said account is justly due and unpaid, and that no part thereof is for usurious interest; that all of said materials were furnished to the said National Construction Company of Atlanta, Georgia, but shipped to and used in Project SBP No. 4, Section 8 in Perry and Decatur Counties, in the State of Tennessee.

Dated at Nashville, Tennessee, this the 9th day of August, 1930.

William J. Walker.

Subscribed and sworn to before me, this 9th day of August 1930. Paul L. Williams, Notary Public. (Seal.)

[fol. 82] EXHIBIT "C" TO PETITION OF R. H. BAKER, COMMISSIONER, ETC.—Filed October 4, 1930.

Claimant's Bond

STATE OF TENNESSEE,
County of Davidson:

Know all men by these presents, That the International Steel & Iron Company, of the State of Indiana, a corpora-

tion, as principal, and the United States Fidelity & Guaranty Company, as surety, are hereby held and firmly bound unto the State of Tennessee, for the use and benefit of the contractors herein named in the penal sum of Fifty-Nine Thousand Eight Hundred Thirty-Three Dollars and Seventy-One Cents ($59,833.71) for the payment of which well and truly to be made, we do hereby bind ourselves, assigns and personal representatives, but the condition of this bond is:

That the said International Steel & Iron Company has this day filed with the Department of Highway and Public Works of the State of Tennessee, under the provisions of Chapter 80 of the Public Acts of 1929, amending Chapter 4 of the Public Acts of 1917, the claim against the National Construction Company of Atlanta, Georgia, in the sum of Fifty-Nine Thousand Eight Hundred Thirty-Three Dollars and Seventy-one Cents ($59,833.71) for labor and material furnished said contractor while engaged in per-
[fol. 83] forming a contract upon special bridge project No. 4, Section 8.

Now, therefore, provided that the said International Steel & Iron Company shall faithfully prosecute said claim and on failing to do so, shall pay the amount of any judgment and court costs awarded against it by the reason of the filing and the prosecution of the claim, not exceeding thirty (30) per cent of the amount thereof, then this obligation to be null and void, but otherwise to remain in full force and effect.

This the 19th day of August, 1930.

International Steel & Iron Company, by William J. Walker, Treasurer, Principal. United States Fidelity & Guaranty Co., by H. Phelps Smith, Surety, Attorney-in-fact.

[fol. 84] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER AND CROSS-BILL OF THE NATIONAL CONSTRUCTION COMPANY—Filed May 19, 1931

For answer to the bill filed against it and others in the above-styled cause this defendant says:

I

That it is not informed concerning the allegations as to the organization and domesticating of the complainant, but insofar as the same may be material to the rights of this defendant it demands strict proof thereof.

[fol. 85] II

The facts alleged in paragraph one of the bill concerning this defendant's organization and domestication are correctly stated.

III

Defendant admits that on or about March 12, 1928, it entered into a contract with the State of Tennessee through its Department of Highways and Public Works and that the terms of such contract were substantially as set forth in complainant's bill. This defendant will file on or before the hearing properly authenticated copy of such contract if called on so to do. Defendant likewise admits that it executed a bond to the State of Tennessee in the penal sum of two hundred eighty-five thousand nine hundred seventy-six dollars and twenty cents ($285,976.20), with the defendant National Surety Company as its surety thereon, guaranteeing performance of said contract, but defendant does not admit that complainant correctly set forth the terms and provisions of said bond and will file properly authenticated copy thereof on or before the hearing if called on so to do.

[fol. 86] IV

Defendant admits that on or about March 22nd, 1928, it entered into a contract with complainant by which complainant agreed to furnish, fabricate, deliver on the bridge site, erect, and paint approximately 1,974,500 pounds of structural and cast steel, including sheet lead and structural steel spans for said bridge, as per plans and specification covering the work prepared by the State of Tennessee Department of Highways and Public Works. Said contract further provided that complainant after receiving twenty days prior notice of the time to begin the erection of said structural steel, steel castings, etc., would immediately begin said erection and would complete the same within 115 working days. Copy of said contract is herewith filed

as Exhibit "A" hereto and made a part hereof but the same need not be copied.

Defendant denies that complainant pursuant to the terms and provisions of said contract duly fabricated, delivered and furnished to this defendant said structural steel, cast steel and sheet lead, and denies that complainant completed and erected said steel spans according to the terms of said contract. Instead of completing the steel work within the time required by the contract, such time was exceeded by more than ten months. Defendants admits that from time [fol. 87] to time during the progress of the work it paid the complainant certain sums of the contract price, but did so with the distinct understanding between it and complainant that it was not waiving the terms of the contract and that it was intending to hold complainant responsible to it for all the damages which defendant might suffer by reason of complainant's delay in carrying on the work. It denies that there is a balance of fifty-nine thousand eight hundred thirty-three dollars and seventy-one cents ($59,833.71), or any sum whatever due from it to complainant. It will show on the hearing that the damages suffered by it on account of complainant's failure to perform its contract and erect the steel within the time provided by the contract was greatly in excess of the amount claimed by complainant against this defendant.

V

Defendant neither admits nor denies the allegations that complainant duly filed its claim with the Department of Highways and Public Works as required by law, and demands strict proof thereof.

Defendant admits that on the day set for final settlement the Department of Highways and Public Works had retained from the funds due defendant the sum of seventy-[fol. 88] seven thousand sixty-nine dollars and eighty-two cents ($77,069.82), and that upon execution of a refunding bond as provided by law in the penal sum of the amount of said retainage, which bond the Equitable Casualty and Surety Company, a defendant herein, signed as surety, said retainage was paid over to the defendant by the Department of Highways and Public Works.

VI

Defendant further says that at the time of the making of said contract and prior thereto and until after the filing of this suit, complainant was not authorized to do business in Tennessee, having to the present time failed, neglected and refused to pay the privilege tax required of it by law, which failure is specially pleaded and relied upon in bar of complainant's right to maintain this suit.

All allegations contained in said bill not already specifically denied are here and now generaly denied, and denied as fully as though separately and specifically denied.

And now, having fully answered said bill, this defendant prays to be hence dismissed with its reasonable costs.

[fol. 89] Cross-Bill

And now, being advised that on the facts hereinbefore alleged and hereafter to be alleged, this defendant is entitled to relief, it assumes the character of cross-complainant and says:

Cross-complainant, for the purpose of performing its contract with the State of Tennessee to erect said bridge, was required to keep and did keep a large organization, employing many laborers, workmen, clerks, superintendents, and executives, and a large amount of machinery, tools, equipment and supplies. Cross-complainant was required to keep such organization, machinery, equipment, and supplies on hand at heavy expense during the progress of the work in building said bridge. Cross-complainant was also under the necessity of paying large sums for maintenance of said organization, machinery, and equipment, for insurance thereon, for interest on its invested capital in said organization, machinery, equipment, and supplies, for workmen's compensation insurance, and for surety bond premiums during the period of said work. All these items of expenditures were large and accrued during the period of about ten months' delay resulting from the breach of its contract by cross-defendant, International Steel & Iron [fol. 90] Company. During said ten months' delay occasioned by said breach of said contract by cross-defendant, cross-complainant was of necessity prevented from receiving its compensation from the State of Tennessee for

the erection of said bridge and the interest on the amounts of money which cross-complainant was thus delayed in receiving from the said wrongful acts and breach of its contract by cross-defendant amounts to large sums of money. During said period of delay cross-complainant was also required to pay rent on barges and boats, maintain camp sites, pay traveling expenses for its officers and executives. All of said expenses, losses, and damages so resulting to cross-complainant as a consequence of the breach by cross-defendant of its said contract amounted to far more than the amount sought by complainant's bill. Itemized and detailed statements of said expenses, losses and damages will be fully shown and set forth at the hearing.

Premises Considered, Cross-Complainant Prays:

1. That this answer may be filed, deemed and treated as a cross-bill, and that subpoena to answer and copy thereof be served upon the International Steel & Iron Company, complainant in the original bill and cross-defendant herein, [fol. 91] to compel it to answer this cross-bill, but oath to its answer is waived.

2. That on the hearing cross-complainant be granted a recovery against said International Steel & Iron Company, for the expenses, losses and damages resulting to cross-complainant by reason of the wrongful breach by cross-defendant of its said contract, and that an accounting be had between cross-complainant and cross-defendant to show and ascertain all such expenses, losses, and damages, and to this end grant that all references to the Master may be had.

3. That cross-complainant have such other, further, and general relief as it may be entitled to upon the hearing.

National Construction Company, by Albert Williams, Solicitor.

We are sureties for the costs incident to filing this cross-bill.

Albert Williams, S. L. Felts.

[fol. 92] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER OF NATIONAL SURETY COMPANY—Filed October 29, 1931

The defendant, National Surety Company, for separate answer to the Bill of Complaint filed against it and others in the above entitled cause, says:

It is admitted that on March 12, 1928, the defendant, National Construction Company, entered into a contract with the State of Tennessee, through its Department of Highways and Public Works, for the construction of the Perryville Bridge, as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways and Public Works, and as provided by law the said National Construction Company entered into a bond, also dated March 12th, 1928, conditioned as required by law in such cases, in the penalty of $285,976.20, executed by this defendant as surety thereon. The contract between the National Construction Company and the Department of Highways and Public Works of the State of Tennessee, [fol. 93] and the bond executed in connection therewith, are referred to for a full and proper understanding of their terms and provisions.

It is admitted that on or about March 22nd, 1928, the complainant entered into a written contract with the National Construction Company to furnish certain structural and cast steel, including sheet lead and structural steel spans for said Perryville Bridge. This defendant is informed that the complainant duly fabricated, delivered and furnished to said defendant the structural and cast steel and sheet lead, all of which were used in the construction of said bridge.

This defendant is informed that the National Construction Company insists that it is not indebted to the complainant in the sum of $59,833.71 or in any other amount.

On September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee held as final retainage on the project aforesaid the sum of $77,099.32, which was in excess of the amount required to pay in full all claims that were filed, so that all of said claims were fully protected.

On said September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee, released said $77,099.32 to the National Construction Company, and accepted a refunding bond conditioned as follows:

[fol. 94] * * * if the said National Construction Company shall pay such of the above listed claims (including the claim of complainant) as may be adjudicated just, proper and legal claims against it on said Project, or failing to pay such claims, shall refund to the State of Tennessee the $77,099.32 this day paid it with interest, then this obligation to be void, otherwise, to remain in full force and effect." * * * that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said Project, as fully as if the retainage had not been paid to the contractor, but had been withheld by the Department, and said claimants or any of them, in the event their claims are adjudicated just, proper, and legal claims against said Project, are authorized by all parties hereto to bring suit on this bond, provided, the liability of the surety shall not exceed $77,099.32, the amount of the retainage this day paid to the contractor, together with such interest and cost as the Court may allow."

[fol. 95] It is insisted that the release of said retainage and the aceptance of said Refunding bond necessarily released and relieved this defendant of any liability to the Department of Highways and Public Works of the State of Tennessee, for any and all claims set forth in said Refunding Bond, one of which was the claim of the complainant. It is further insisted that the release of said retainage and the acceptance of said Refunding Bond necessarily released and relieved this defendant of any and all liability to each and every claimant included in said Refunding Bond, one of which was the complainant herein.

All averments of the bill not hereinbefore expressly admitted or denied, are here and now generally denied, and denied as fully as if separately and specifically denied.

And now, having answered, this defendant prays to be dismissed.

Hume & Armistead, Solicitors for National Surety Company.

[fol. 96] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ANSWER OF INTERNATIONAL STEEL & IRON CO. TO CROSS-BILL OF NATIONAL CONSTRUCTION COMPANY—Filed July 6, 1931

Comes the cross-defendant, International Steel & Iron Company, and for answer to the cross-bill filed in this cause against it by National Construction Company, says:

Cross-defendant denies that it breached its contract, as alleged in the cross-bill, and avers that it faithfully and punctually performed its contract in strict accordance with the terms and provisions thereof, all of which is set out in more particular detail in the original bill, and the cross-defendant refers to same and adopts the allegations of said original bill as a part of its answer to the cross-bill.

[fol. 97] Cross-defendant denies that the cross-complainant was under the necessity of paying large sums for maintenance of organization, machinery and equipment, for insurance thereon, for interest on its invested capital in said organization, machinery, equipment and supplies, for workmen's compensation insurance, and for surety bond premiums during the period of said work, for a period of about ten months on account of any breach or delay on the part of the cross defendant. Cross defendant denies that the cross complainant was prevented from receiving its compensation from the State of Tennessee on account of any negligence or breach of cross-defendant in the performance of its contract, and denies that cross-complainant lost the interest on the amounts of money due it by the State of Tennessee by reason of any negligence or breach of contract by this cross-defendant.

Cross-defendant denies that cross-complainant was required to pay rent on barges and boats, maintain camp sites and pay traveling expenses for its officers and executives by reason of any negligence or breach of contract by this cross-defendant.

Cross-defendant further says that at the time the cross-complainant entered into its contract with the State of Tennessee, and at all times thereafter and until the time of [fol. 98] the filing of its answer, cross-complainant was not

authorized to do business in Tennessee because of its failure, neglect and refusal to pay the privilege tax required of it by law, which failure is especially pleaded and relied on in bar of cross complainant's right to maintain the cross-bill in this suit.

Cross-defendant further denies that it is indebted to the cross-complainant in any sum whatsoever by reason of any negligence or breach of its contract, and avers on the other hand that cross-complainant is justly indebted to it in the sum set out in its original bill.

All allegations contained in said cross-bill not already specifically denied are here and now generally denied, and denied as fully as though separately and specifically denied.

And now, having fully answered said cross-bill, cross-defendant prays that the cross-bill be dismissed at the cost of the cross-complainant.

Louis Leftwich, Bass, Berry & Sims, Solicitors for International Steel & Iron Company.

[fol. 99] In Chancery Court of Davidson County

[Title omitted]

Decree of January 27, 1932

It appearing to the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, has agreed to accept, in substitution for the Refunding Bond executed on September 3rd, 1930, by the National Construction Company, contractor on Project No. S. B. P. 4-A, in Decatur-Perry Counties, known as "Perryville Bridge" as principal, and Equitable Casualty and Surety Company, as surety, a Substitute Refunding Bond in the sum of $40,000.00, executed by the National Construction Company as principal, and the Consolidated Indemnity and Insurance Company, as surety, said bond to contain all the conditions, stipulations and provisions of the said original Refunding Bond; and it further appearing that the National Construction Company agrees that the delivery and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the original Refunding Bond of Septem-

[fol. 100] ber 3rd, 1930, but that said obligations and liabilities shall be the same as if said Substitute Refunding Bond had not been executed; and it further appearing that R. H. Baker, Commissioner, etc. agrees that the delivery and acceptance of said Substitute Refunding Bond shall release and discharge the Equitable Casualty and Surety Company and its receiver and liquidating agent, from any and all obligations assumed by it under said original Refunding Bond of September 3rd, 1930, and that said Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was given a recovery of $77,099.32 against the National Construction Company;

It is ordered, adjudged and decreed by the Court, on consent of parties, as follows:

1. That the Substitute Refunding Bond, in the penalty of $40,000.00, dated January 23rd, 1932, executed by the National Construction Company, as principal, and the Consolidated Indemnity and Insurance Company, as surety, be accepted in the place and stead of the original Refunding Bond, dated September 3rd, 1930, executed by the National Construction Company, as principal, and the Equitable Casualty and Surety Company, as surety; and that said Substitute Refunding Bond, which is attached and filed as [fol. 101] Exhibit "A" to this decree, be lodged with the Registry of this Court.

2. The filing and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the original Refunding Bond of September 3rd, 1930, but said obligations and liabilities shall be just the same as if the Substitute Refunding Bond had not been filed and accepted.

3. The Equitable Casualty and Surety Company, its Receiver, and Liquidating Agent, are released and discharged from any and all obligations and liabilities assumed by it under the original Refunding Bond of September 3rd, 1930.

4. The Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was awarded a recovery of $77,099.32, against the National Con-

struction Company, as the same appears in Minute Book 25, page 7 of this Court.

5. This decree shall not prejudice, in any respect, the International Steel and Iron Company, or the National Surety Company.

[fol. 102] Approved for entry:

National Construction Company, by S. L. Felts, Solicitor. R. H. Baker, Commissioner of Highways and Public Works for Tennessee, by L. D. Smith, Attorney-General. International Steel & Iron Company, by Louis Leftwich, Cecil Sims, Solicitors. National Surety Company, by William Hume, Solicitor.

[fol. 103] In Chancery Court of Davidson County

[Title omitted]

Decree of October 25, 1932

This cause was heard before Chancellor James B. Newman, on the 25th day of October, 1932, and previous days upon the entire record, oral argument and briefs of solicitors. At the conclusion of the oral argument, the complainant moved the Court to amend the original bill as follows:

"By adding thereto at the conclusion of Section 3 of the original bill, and immediately before the prayer, the following:

"Complainant avers that under the laws of Tennessee it is mandatory upon the defendant, R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, to forthwith pay into this Court in this cause the amount retained by him out of the final estimate due to the defendant National Construction Company, sufficient to cover the amount due the complainant, to wit, $59,833.71, together with an additional amount sufficient to cover interest thereon, which may accrue during the litigation.'

"And to further amend by adding to the prayer of the [fol. 104] original bill, the following:

"That the defendant, R. H. Baker, Commissioner of Highways & Public Works of the State of Tennessee, be forthwith ordered and required by the Court to pay into this Court in this cause out of the funds retained and held by him, pursuant to the statutes of the State of Tennessee, a sum sufficient to cover the amount complainant is claiming to wit: $59,833.71, together with an additional sum sufficient to cover interest thereon that may be reasonably exterest thereon, which may accrue during the litigation."

The Court finds and is of opinion:

(a) That the complainant in its original bill alleged in substance that the refunding bond for the retainage was executed as provided by law and the Department of Highways and Public Works held it for the benefit of claimants who had filed their claims with the Department of Highways and Public Works, and prayed for a decree against the principal and the surety on the refunding bond for the amount claimed to be due the complainant. The proposed amendment calls for the payment of the retainage into Court by the Commissioner of Highways and Public Works.

The complainant having sued on the bond and thereby treated it as a valid obligation, subjecting the principal and [fol. 105] surety thereon to the demands of complainant in a direct suit on the bond, cannot by an amendment, allege that it is the duty of the defendant, R. H. Baker, Commissioner of Highways and Public Works, to pay the retainage into Court for which the bond was executed. Where it is alleged that the bond was taken as provided by law, and the complainant has brought action thereon against the principal and surety, it cannot after the case has gone to trial, change its position by asserting as set forth in the proposed amendment that it is the duty of the Commissioner of Highways and Public Works, to pay the retainage into Court. The amendment is inconsistent and repugnant to the original bill and the application to amend the original bill as proposed, is denied.

(b) It was the joint action of the State of Tennessee, the obligee, and the principal, National Construction Company on the contractor's bond, of which the National Surety Company was surety, in executing the refunding bond and paying out the retainage held by the Department of High-

ways and Public Works. The beneficiary of this action was the National Construction Company and not the complainant, for whose benefit the contractor's bond was made, and but for the act of the National Construction Company for which the National Surety Company was surety, the retainage would still be in the office of the Department of Highways and Public Works.

[fol. 106] The contractor's bond protects the claimants and was executed for their benefit as much as for the benefit of the State, and they cannot be deprived of that protection by the joint act of the principal thereon, and the obligee, the State, and this is true whether the refunding bond was taken within or without statutory authority. As to the surety, the National Surety Company, the contractor's bond is in law not to be treated as performed until complainant's claim is paid, its payment being a condition of the bond. This liability has not been discharged. Furthermore, by Sec. 3222 of the Code, Sub-Sec. D, a contractor's bond is satisfied only when the retainage is paid into Court and the suit dismissed as to the Commissioner of Highways & Public Works. This has not been done in this case.

(c) The contract between the National Construction Company and the International Steel & Iron Company provides that the International Steel & Iron Company were to be notified twenty days prior to the time to begin erection, but it also expressly provides that it was understood that the part of the bridge work to be done by the principal contractor, National Construction Company was to be ready so that the International Steel & Iron Company could proceed with its work without interruption and subject to favorable local conditions for such erection. The National Construction Company under the contract did not have the unconditional [fol. 107] right to fix and determine the time when the International Steel & Iron Company should begin work and give the twenty days notice accordingly, but the notice given was subject to the right of the International Steel & Iron Company to determine whether the work done by the National Construction Company and the local conditions were such that it would not be interrupted after it begun work. This was the construction of the contract by both parties as shown by the letter of July 3, 1929, wherein the National Construction Company notified the Interna-

tional Steel & Iron Company that its work had progressed to the point where the International Steel & Iron Company could commence the erection of its work, and the International Steel & Iron Company accepted and acted under said notice as it had a right to do, as aforesaid.

Both parties treated this notice as a notice under the contract, and the National Construction Company after giving this notice and after work had been begun thereunder by the International Steel & Iron Company made payments to the International Steel & Iron Company on the work. The International Steel & Iron Company and the National Construction Company agreed that the former will "erect and paint * * * structural steel spans for a bridge across the Tennessee River known as the Perryville Bridge * * * as per plans and specifications covering this work as prepared by the State of Tennessee, Department of Highways & Public Works."

[fol. 108] The proof reveals that the party representing the International Steel & Iron Company in the preparation and execution of this contract, examined the plans and specifications embodied in the contract between the State and the contractor, National Construction Company and ascertained that it provided for liquidated damages of $80.00 per day for failure of the contractor to complete the contract within the time specified in the contract, and that when it sublet this work to Naill & Naill it provided that when they were to pay $80.00 per day liquidated damages for failure to complete the contract within the time provided, and after the work was begun, the defendant, National Construction Company deducted from payments made to the International Steel & Iron Company sums which it claimed as liquidated damages at $80.00 per day for failure to complete the work as it had contracted, though these deductions were subsequently paid. Furthermore, the contract after referring to the plans and specifications which provided for liquidated damages of $80.00 per day if the work was not completed by the principal contractor within a certain time, also provided that it was to complete its work in 115 working days, clearly conveying to the minds of the contracting party there would be some penalty if it did not complete within the 115 days.

Whatever may be the law in other jurisdictions with reference to incorporating in a sub-contract, plans and [fol. 109] specifications by reference thereto, the law in

this State is well settled and elementary that the primary rule in the construction of any written contract is to ascertain and give effect to the mutual intentions of the parties, and to that end, such contracts must be construed with reference to the situation of the parties, the business to which it relates and its subject matter. In construing such contracts where the language is ambiguous, the interpretations placed thereon by the parties themselves as shown by their acts, will be adopted by the Court. And in determining what damages result from a breach of a contract, the Court will consider the circumstances which existed at the time the contract was made, and the damages the parties had in mind if the contract was breached, and which according to the understanding of both parties entered into and became a basis of the contract and will allow only such damages as may be reasonably supposed to have been in the contemplation of both parties at the time the contract was made as a result of a probable breach of it.

As stated in the case of Machine Co. vs. Compress Co. 105 Tenn. p. 204:

"The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract [fol. 110] would derive from its performance, is the measure of his damages if it be broken. It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract considered in connection with the surrounding circumstances known to both parties. If it appear by these surrounding circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or to avoid an anticipated loss, the liability of the other for a violation of the contract will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances make it manifest that such damages were within the contemplation of the parties."

In the case under consideration, the only damages that the National Construction Company could have incurred to the State for failure to complete within the contract time, was $80.00 per day, and if the sub-contractor delayed it

beyond its contract time, this was the damage it would have had to pay. The National Construction Company was responsible for the completion of the entire job to the State, and in making the contract with the International Steel & Iron Company plainly intended that if it exceeded the 115 days in the completion of the structural steel work, that it should account to it for liquidated damages at $80.00 per [fol. 111] day. This was the construction of the contract by both parties at its inception, and after the work begun, and the provision for liquidated damages of $80.00 per day contained in the contract between the State and the National Construction Company is incorporated into the contract between the National Construction Company and the International Steel & Iron Company and the National Construction Company is limited to such damages in any recovery it may have against the International Steel & Iron Company for failure to complete its contract within 115 days from the time it should have begun work under its contract.

The Court further finds, and is of opinion:

1. That the National Construction Company notified the International Steel & Iron Company on July 3, 1929 in accordance with their contract to begin work on the Perryville Bridge Project, and this notice was received by the International Steel & Iron Company on July 25, 1929 and on that date the 115 working days begun, and these working days are determined by what was a working day under the original contract between the State and the National Construction Company and measured by this test the 115 working days expired on June 12, 1930. The complainant, International Steel & Iron Company completed its work July 2, 1930, being in default under its contract, 15½ working days and liable to the National Construction Company under its contract therefor, in the sum of $80.00 per day which [fol. 112] amounts to $1,240.00.

2. That the National Construction Company is indebted to the International Steel & Iron Company in the sum of $59,833.71 less the aforesaid sum of $1,240.00 but is not entitled to interest thereon.

Mack v. Huggar Bros. Constr. Co., 10 Tenn. App. Reports, p. 420.

It is therefore ordered, adjudged and decreed by the Court:

(a) That the complainant International Steel & Iron Company have and recover of the defendants, National Construction Company and the National Surety Company the sum of $58,593.71 for which let execution issue.

(b) That the defendants National Construction Company and the National Surety Company pay seven-eighths of the costs of this cause, and the complainant, International Steel & Iron Company one-eighth of the costs of this cause, for which let execution issue.

It appearing from the record that the defendant, R. H. Baker, Commissioner, etc., and the National Construction Company in lieu and discharge of a judgment entered in this cause on August 27, 1931, wherein R. H. Baker, Commissioner, etc., was awarded a recovery for $77,099.32 for the retainage paid by him to the National Construction Company have agreed to accept a substitute refunding bond [fol. 113] in the sum of $40,000.00 which was executed on January 23, 1932, by the National Construction Company as principal and the Consolidated Indemnity & Insurance Company as surety. The condition of said bond is,

"Now, therefore, if said National Construction Company shall pay the above listed claims as may be adjudicated just, proper and legal claims against it on said project, or failing to pay such claims shall refund to the State of Tennessee the sum of $40,000.00, then this obligation to be void, otherwise to remain in full force and effect."

and by a consent decree entered in Minute Book 25, page 297 on January 27, 1932, and signed by the National Construction Company, Baker, Commissioner, etc., the International Steel & Iron Company and the National Surety Company, said substitute refunding bond which is filed as Exhibit "A" to the decree, is lodged with the registry of this Court.

It is therefore ordered, adjudged and decreed by the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, be and is ordered and directed to collect and pay the penalty of said bond into Court in this cause, to be credited on the judgment herein rendered against the National Construction Company and the National Surety Company.

To the action of the Court in declining to permit the amendment to the original bill which seeks to require the

defendant, R. H. Baker, Commissioner of Highways & Pub-
[fol. 114] lic Works to pay into Court sufficient money to cover complainant's claim, and costs, and in declining to order said sum paid into Court by said defendant, and to the action of the Court in holding complainant International Steel & Iron Company liable to National Construction Company for $1,240.00 damages, and to the refusal of the Court to allow interest the complainant duly excepted, and prayed an appeal to the Court of Appeals sitting at Nashville, which is granted by the Court upon the complainant giving bond and otherwise perfecting said appeal within thirty days as required by law.

[fol. 115] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

DECREE OF NOVEMBER 18, 1932

This cause came on to be re-heard this November 17, 1932, before Chancellor James B. Newman, upon the petition to rehear, the reply thereto and the whole record in the cause, and argument of counsel having been heard, on consideration of all of which it is ordered, adjudged and decreed by the Court that the prayer of the petition be granted and the cause re-heard only to the extent prayed.

And thereupon it is ordered and decreed that the following part of the decree pronounced in this cause on October 25, 1932, and entered in Minute Book 26, pages 332-335, viz: "It is therefore ordered, adjudged and decreed by the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, be and is ordered and directed to collect and pay the penalty of said bond into Court in this cause to be credited on the judgment herein rendered against the National Construction Company and the National Surety Company", be set aside, recalled and annulled, and that said decree entered in Minute Book 26, [fol. 116] pages 332-335 be amended by adding thereto after the words in said decree, "said Substitute refunding bond which is filed as Exhibit A to the decree is lodged with the registry of this Court," the following:

"That the complainant have and recover of the National Construction Company and the Consolidated Indemnity

Insurance Company the sum of $40,000.00 for which let execution issue, and when said sum is collected it shall be credited on the judgment rendered against the National Construction Company and the National Surety Company of $58,593.71." The decree entered in Minute Book 26, pages 332-335 is changed only as above indicated, and in all other respects is approved and confirmed.

To so much and such parts of the decree entered in Minute Book 26, pages 332-335 as renders judgment against it for $58,593.71 and taxes it with seven-eighths of the costs of the cause, the National Surety Company excepts and prays an appeal to the present term of the Court of Appeals, sitting at Nashville, which is by the Court granted upon its executing bond as required by law, and it is allowed thirty days from this date in which to perfect its appeal.

Upon application of the defendant, the National Construction Company, the decree heretofore entered in this cause in Minute Book 26, page 353, granting it an appeal, is set aside. Thereupon, the defendant the National Construction Company excepts to the decree entered in Minute [fol. 117] Book 26, pages 332-335 and the foregoing decree amendatory thereof, and prays a broad appeal from said decree as amended, to the present term of the Court of Appeals sitting at Nashville, which is by the Court granted upon its executing bond as required by law, and it is allowed thirty days from this date in which to perfect its appeal.

O. K. for entry:

Hume & Armistead, Bass, Berry & Sims, Louis Leftwich, Solicitors for Complainant.

[fol. 118] IN COURT OF APPEALS OF TENNESSEE

Sitting at Nashville

[File endorsement omittted]

Equity No. ——

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION COMPANY, ET ALS.

ASSIGNMENTS OF ERROR ON BEHALF OF NATIONAL SURETY COMPANY, APPELLANT—Filed March 23, 1933

[fol. 119]

I

The Chancellor erred in not dismissing the suit as to National Surety Company.

II

The Chancellor erred in rendering judgment against National Surety Company for $58,593.71.

III

The Chancellor erred in not holding that the final settlement made by the Commissioner with the National Construction Company, on September 3d. 1930, the release of the retainage, the acceptance of a new bond in place of the retainage, and the delivery of the bond in Court in response to the suit thereon, was a fulfilment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety.

[fols. 120 & 121] Bond on Appeal for $60,000.00 approved and filed Dec. 16, 1932, omitted in printing.

[fol. 122] [File endorsement omitted.]

[fol. 123] IN COURT OF APPEALS OF TENNESSEE

Davidson Chancery

INTERNATIONAL STEEL & IRON COMPANY

v.

NATIONAL CONSTRUCTION COMPANY ET AL.

OPINION—Filed Dec. 2, 1933

This case is before us on the appeal of National Surety Company from a judgment against it and in favor of International Steel & Iron Company for $58,593.71 and seven-eighths of the costs accrued in the Chancery Court.

On March 12, 1928, the National Construction Company contracted with the Department of Highways and Public Works of the State of Tennessee to construct a bridge over the Tennessee River in Perry and Decatur Counties, in this State, Known to the Department as "Special Bridge Project #4-A", and generally known to the public as the Perryville Bridge.

On the same day, the National Construction Company executed a bond in the penalty of $285,976.20, with appellant, National Surety Company, as surety thereon, guaranteeing the performance of said contract. Neither the bond nor the contract is in the record brought to this Court (which record was "designated" by the solicitors for ap-[fol. 124] pellant, upon due notice to solicitors for appellees), but it is, in substance, admitted in the pleadings that this bond was executed pursuant to and in conformity with the Highway Act of 1917, ch. 74, which provides that, "All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work", and "This bond must be approved by the Department and filed with his records."

On March 22, 1928, the International Steel & Iron Company contracted with the National Construction Company to furnish certain structural and cast steel, including sheet lead and structural steel spans, for which the National Construction Company agreed to pay to the International Steel

& Iron Company the sum of $135,020.53, and all of which was thereafter furnished and delivered by the International Steel & Iron Company and was used in the construction of said bridge.

The bridge was completed on July 2, 1930, and was, on that date, accepted by the Department of Highways and Public Works as a completed Project.

During the progress of the work payments on account were made to the International Steel & Iron Company from time to time, which payments aggregated $75,186.82, leav- [fol. 125] ing an unpaid balance of $59,833.71 on the contract price at the time of the completion of the bridge on July 2, 1930.

Pursuant to the provisions of section 6 of chapter 74 of the Acts of 1917, the Commissioner of Highways and Public Works advertised in newspapers published in Decatur and Perry Counties, respectively, that settlement was about to be made with the principal contractor on said Project, and notifying all claimants to file notice of their claims with the Department of Highways and Public Works—the last publication of said advertisement being made on August 20, 1930.

On August 19, 1930, the International Steel & Iron Company filed notice of its claim for the aforesaid sum of $59,- 833.71 with the Commissioner of Highways and Public Works, and at the same time filed with the Commissioner a bond in a penal sum equal to the amount of its claim, in the manner and form prescribed by subsection (e) of section 1 of chapter 80 of the Acts of 1929.

The Commissioner of Highways and Public Works fixed September 3, 1930, as the day and date for final settlement with the principal contractor, National Construction Company, at which time the Commissioner had in his hands the sum of $77,099.32, which he had withheld from the principal contractor, National Construction Company, and which was a sufficient sum to pay all claims of which notice had been [fol. 126] filed with him.

On the aforesaid day set for final settlement (September 3, 1930), the National Construction Company as principal, and the Equitable Casualty & Surety Company, as surety, executed a "refunding bond", in words and figures as follows:

"Refunding Bond

We, the National Construction Company, as Principal, and Equitable Casualty & Surety Company, as Surety, acknowledge ourselves indebted and firmly bound unto the State of Tennessee, in the sum of $77,099.32, Seventy Seven Thousand and Ninety-Nine and 32/100, Dollars.

The condition of the above obligation is such that:

Whereas, the Department of Highways and Public Works of the State of Tennessee, hereinafter called the 'Department' has this day made final settlement with the National Construction Company contractor on Project No. S. B. P. 4—being the construction of a steel and concrete bridge over Tennessee River known as 'Perryville Bridge' hereinafter called the contractor, by paying said contractor $77,099.32, Seventy Seven Thousand Ninety-nine and 32/100, the amount of the final retainage heretofore withheld, and [fol. 127] Whereas, there has been filed with said Department the following listed claims against said Contractor on said Project, to-wit:

Longstaff Orm Lumber Company	$2,188.52
C. A. Livingstone	90.00
Tennessee Mill & Mine Supply Company	499.92
Henry A. Petter Supply Co.	2,624.92
Chicago Pneumatic Tool Co.	688.22
Manhattan Rubber Mfg. Co.	94.40
George A. McDonald	1,136.87
J. E. Reynolds	375.00
Hassell Lumber Company	2,733.65
W. R. Dennison	243.80
C. G. Kershaw Contracting Company	300.00
Williams & Guinn	73.50
International Steel & Iron Co.	59,833.71
Day-Evans Iron Works, Inc.	110.16
Hermitage Portland Cement Co.	242.80
J. K. Martin	105.00
Standard Oil Co. of La.	704.08
J. O. Ashman	223.00
Sverre Olsen	1,242.85

Now, therefore, if the said National Construction Company shall pay such of the above listed claims as may be [fol. 128] adjudicated just, proper and legal claims against

it on said Project, or failing to pay such claims, shall refund to the State of Tennessee the $77,099.32 this day paid it with interest; then this obligation to be void, otherwise, to remain in full force and effect.

This obligation is executed under the provision of Chapter 80, Acts of 1929, and upon full understanding by all parties that it stands in place and in lieu of said $77,099.32, the retainage this day paid the contractor; that it is executed to protect said Department and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the contractor on said Project, as fully as if the retainage had not been paid to the contractor but had been withheld by the Department, and said claimants or any of them, in the event their claims are adjudicated just, proper and legal claims against said Project, are authorized by all parties hereto to bring suit on this bond, provided, the liability of the surety hereto shall not exceed $77,099.32, the amount of the retainage this day paid to the contractor, together with such interest and cost as the Court may allow.

[fol. 129] This the 3rd day of September, 1930.

National Construction Company, by John A. McDonald, President. Principal. Equitable Casualty & Surety Company, Surety, by Howard Dye, Attorney-in-fact."

The above quoted "refunding bond" was delivered to and accepted by, the Commissioner of Highways and Public Works, who thereupon paid over to the principal contractor, National Construction Company, the sum of $77,099.02 which had been theretofore retained or withheld by him as aforesaid.

On September 12, 1930, the bill in this case was filed by International Steel & Iron Company, as complainant, against National Construction Company, National Surety Company, Equitable Casualty & Surety Company and R. H. Baker, Commissioner of Highways and Public Works of the State of Tennessee, as defendants. All the parties, except R. H. Baker, Commissioner etc., are (or were when

the bill was filed) corporations organized under the laws of States other than Tennessee.

In its bill, complainant International Steel & Iron Company set forth, in substance, the facts we have stated, and alleged that the Department of Highways and Public Works "now holds said refunding bond for the benefit of [fol. 130] claimants who had filed their claims with said Department of Highways and Public Works."

After the usual prayer for process and waiver of answer on oath, complainant prayed for a decree against National Construction Company, National Surety Company and Equitable Casualty & Surety Company for $59,833.71 and costs, and also prayed for general relief.

On October 4, 1930, R. H. Baker, Commissioner etc., filed a pleading in the nature of an answer to the original bill (but which is styled "petition"), in which he stated that final settlement was made with the contractor, National Construction Company, on September 4, 1930; that under chapter 74 of the Acts of 1917, and Acts amendatory thereof, a refunding bond was executed by the contractor covering the amount of all claims filed with the Department of Highways and Public Works against said Project, including the claim on which this suit was brought; that the claimant, International Steel & Iron Company, filed with the Department a claim in the amount of $59,833.71 for materials, supplies and labor furnished and used in the construction of the Perryville Bridge, and also a claimant's bond covering said claim. Certified copies of the "refunding bond", the "claim" of the International Steel & Iron Company, and the "claimant's bond", respectively, were filed with the "petition" as exhibits thereto.

[fol. 131] The Commissioner concluded his "petition" with the statement that he had "fully answered as required by chapter 80, Public Acts of 1929", and he prayed "that this suit be dismissed as to him."

On May 19, 1931, defendant National Construction Company answered the bill, and filed its answer as a cross-bill seeking to recover damages for an alleged breach of contract by complainant, in that, complainant had delayed the performance of its contract for more than ten months beyond the stipulated period, which delay had resulted in loss and damage to defendant National Construction Com-

pany to an amount "far more than the amount sought by complainant's bill."

The International Steel & Iron Company answered said cross-bill and denied that it had breached its contract in any respect, and denied that it was indebted to cross-complainant, National Construction Company, in any sum whatever by reason of any negligence or breach of contract.

On June 26, 1931, R. H. Baker, Commissioner of the Department of Highways and Public Works, filed (by leave of the Court) a petition in which he recited the filing of his aforementioned "answer in this cause" on October 4, 1930, and the contents thereof, particularly the fact of the execution by National Construction Company of a "refunding [fol. 132] bond" in the penalty of $77,099.32, with the Equitable Casualty & Surety Company as surety thereon, and then alleged that "the Equitable Casualty & Surety Company became insolvent, its corporate charter forfeited, surrendered and annulled; the corporation dissolved and its affairs are now in process of liquidation by the Superintendent of Insurance of the State of New York."

It was further alleged in said petition that said refunding bond was executed to stand in place and in lieu of said $77,099.32, the amount of retainage paid to the National Construction Company; that it was executed to protect said Department of Highways and Public Works and the State of Tennessee from all liability on and because of said claims, and to protect and guarantee to that amount the payment of such of said claims as may be adjudicated just, proper and legal claims against the National Construction Company on said project, as fully as if the retainage had not been paid to the National Construction Company, but had been withheld by the Department.

Petitioner then enumerated the several "claimants protected by said refunding bond" whose claims had not been paid and who then had suits pending, which aggregated $69,551.65, including the claim of the International Steel & Iron Company for $59,833.71.

Petitioner alleged, on information, that the National [fol. 133] Construction Company is a foreign corporation and has no property or place of business in Tennessee.

For the terms and provisions of said refunding bond, petitioner referred to the certified copy of same attached

to his answer to the original bill and filed as Exhibit A thereto, and he alleged that "inasmuch as nearly $70,000.00 of claims protected and guaranteed by said refunding bond have not been paid, and suits are pending seeking to collect the same, and inasmuch as the Equitable Casualty and Surety Company, surety on said refunding bond, is insolvent and its guarantee of no value, Petitioner is advised, and so insists, that the National Construction Company should be required to refund and pay into the Registry of this Court an amount sufficient to protect the claims aforesaid, on which suits are now pending, or in lieu to provide a good and sufficient corporate surety to take the place of the Equitable Casualty and Surety Company, insolvent."

The prayer of said petition is that (1) petitioner be allowed to file this petition to this cause and that a copy thereof be served on the defendant National Construction Company; (2) that a decree be entered requiring the defendant, National Construction Company, to refund and pay into the Registry of the Court the sum of $77,099.32, or, in lieu to file a bond with good and solvent corporate surety, in the same words and figures, and to take the place of the refunding bond, a certified copy of which is [fol. 134] filed as Exhibit A to the answer of petitioner herein to the original bill in this cause, and (4) for general relief.

On June 30, 1931, the National Construction Company filed an answer to the said petition of the Commissioner of Highways and Public Works, and therein admitted that its surety on said refunding bond, The Equitable Casualty & Surety Company, after making said refunding bond on September 4, 1930, became insolvent on December 30, 1930, and that its affairs are in the process of liquidation in the Courts of the State of New York.

The National Construction Company further alleged in its answer that it "is advised that said settlement and payment to it of said $77,099.32 was a final settlement and payment to it and that it cannot properly be required to refund said money or to execute another bond at the instance of petitioner Baker because in making said settlement petitioner Baker acted in accordance with the law and incurred no liability whatever to any of said claimants."

On June 30, 1931, the Chancellor decreed that "the National Construction Company be and is ordered and directed to execute a refunding bond in the same penalty and for the same purposes as the refunding bond heretofore executed by it, with sufficient surety thereon to be ap- [fol. 135] proved by R. H. Baker, Commissioner of the Department of Highways and Public Works, on or before the 7th day of July 1931, and upon failure to execute said bond by the time aforesaid, said National Construction Company is ordered and directed to pay back into the office of R. H. Baker, Commissioner of the Department of Highways and Public Works, the sum of $77,099.32."

On July 8, 1931, the Chancellor overruled a petition of the National Construction Company for a rehearing, but extended the time for its compliance with the aforesaid order of June 30, 1931, until August 7, 1931.

The National Construction Company did not comply with the order of June 30, 1931, and on August 27, 1931, the Chancellor decreed that R. H. Baker, Commissioner etc., recover of defendant National Construction Company the sum of $77,099.32, and the costs incident to the petition filed by the Commissioner, for all of which execution was awarded.

On October 29, 1931, the defendant National Surety Company answered the original bill and admitted the contract between the National Construction Company and the Department of Highways and Public Works for the construction of the Perryville Bridge and the contract between the International Steel & Iron Company and the National Construction Company as hereinbefore set forth. Defendant National Surety Company then alleged in its answer that, [fol. 136] "on September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee held as final retainage on the project aforesaid the sum of $77,-099.32, which was in excess of the amount required to pay in full all claims that were filed, and that all of said claims were fully protected; that on September 3rd, 1930, the Department of Highways and Public Works of the State of Tennessee released said $77,099.32 to the National Construction Company, and accepted a refunding bond conditioned as follows: (Here the conditions of the "refunding bond" hereinbefore copied are set forth, and the answer then proceeds and concludes as follows):

"It is insisted that the release of said retainage and acceptance of said refunding bond necessarily released and relieved this defendant of any liability to the Department of Highways and Public Works of the State of Tennessee, for any and all claims set forth in said refunding bond, one of which was the claim of the complainant. It is further insisted that the release of said retainage and the acceptance of said refunding bond necessarily released and relieved this defendant of any and all liability to each and every claimant included in said refunding bond, one of which was the complainant herein.

[fol. 137] All averments of the bill not hereinbefore expressly admitted or denied, are here and now generally denied, and denied as fully as if separately and specifically denied.

And now, having answered, this defendant prays to be dismissed."

On January 27th, 1932, a decree was entered in words and figures as follows:

"It appearing to the Court that R. H. Baker, Commissioner of Highways and Public Works for Tennessee, has agreed to accept, in substitution for the refunding bond executed on September 3rd, 1930, by the National Construction Company, contractor on Project No. S. B. P. 4-A, in Decatur-Perry Counties, known as 'Perryville Bridge' as principal, and Equitable Casualty and Surety Company, as surety, a Substitute Refunding Bond in the sum of $40,000.00, executed by the National Construction Company as principal, and the Consolidated Indemnity and Insurance Company, as surety, said bond to contain all the conditions, stipulations and provisions of the said original refunding bond; and it further appearing that the National Construc-[fol. 138] tion Company agrees that the delivery and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the Original Refunding Bond of September 3rd, 1930, but that said obligations and liabilities shall be the same as if said Substitute Refunding Bond had not been executed; and it further appearing that R. H. Baker, Commissioner, etc., agrees that the delivery and acceptance of said Substitute Refunding Bond shall release and discharge the Equitable Casualty and Surety Company

and its receiver and liquidating agent, from any and all obligations assumed by it under said Original Refunding Bond of September 3rd, 1930, and that said Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was given a recovery of $77,099.32 against the National Construction Company;

It is ordered, adjudged and decreed by the Court, on consent of parties, as follows:

1. That the Substitute Refunding Bond, in the penalty of $40,000.00, dated January 23rd, 1932, executed by the National Construction Company, as principal, and the Consolidated Indemnity and Insurance Company, as surety, be [fol. 139] accepted in the place and stead of the Original Refunding Bond, dated September 3rd, 1930, executed by the National Construction Company, as principal, and the Equitable Casualty and Surety Company, as surety; and that said Substitute Refunding Bond, which is attached and filed as Exhibit 'A' to this decree, be lodged with the Registry of this Court.

2. The filing and acceptance of said Substitute Refunding Bond shall not release the National Construction Company of any obligation or liability that it incurred on the original Refunding Bond of September 3rd, 1930, but said obligations and liabilities shall be just the same as if the Substitute Refunding Bond had not been filed and accepted.

3. The Equitable Casualty and Surety Company, its Receiver, and Liquidating Agent, are released and discharged from any and all obligations and liabilities assumed by it under the Original Refunding Bond of September 3rd, 1930.

4. The Substitute Refunding Bond shall be in lieu and discharge of the judgment entered in this cause on August 27th, 1931, wherein R. H. Baker, Commissioner, etc., was awarded a recovery of $77,099.32, against the National Construction Company, as the same appears in Minute Book 25, page 7, of this Court.

[fol. 140] 5. This decree shall not prejudice, in any respect, the International Steel and Iron Company, or the National Surety Company."

The "substitute refunding bond" mentioned and described in the foregoing decree of January 27, 1932, was

"approved and accepted on behalf of the State of Tennessee" by R. H. Baker, Commissioner of Highways and Public Works, and L. D. Smith, Attorney-General.

The case was thereafter heard by the Chancellor upon the entire record, and the decree was entered on October 25, 1932, but we need tc mention here only those matters adjudicated in said decree which are pertinent to the issues presented on this appeal.

With respect to the liability of the appellant, National Surety Company, the Chancellor held and adjudged as follows:

"It was the joint action of the State of Tennessee, the obligee, and the principal, National Construction Company on the contractor's bond, of which the National Surety Company was surety, in executing the refunding bond and paying out the retainage held by the Department of Highways and Public Works. The beneficiary of this action was the National Construction Company and not the complainant, for whose benefit the contractor's bond was made, and [fol. 141] but for the act of the National Construction Company for which the National Surety Company was surety, the retainage would still be in the office of the Department of Highways and Public Works.

The Contractor's bond protects the claimants and was executed for their benefit as much as for the benefit of the State, and they cannot be deprived of that protection by the joint act of the principal thereon, and the obligee, the State, and this is true whether the refunding bond was taken within or without statutory authority. As to the surety, the National Surety Company, the contractor's bond is in law not to be treated as performed until complainant's claim is paid, its payment being a condition of the bond. This liability has not been discharged. Furthermore, by Sec. 3222 of the Code, Sub-Sec. D, a contractor's bond is satisfied only when the retainage is paid into Court and the suit dismissed as to the Commissioner of Highways and Public Works. This has not been done in this case."

The Chancellor decreed that National Construction Company recover of International Steel & Iron Company the sum of $1240.00 by way of recoupment under its cross-bill on account of damages for the failure of the International [fol. 142] Steel & Iron Company to perform its contract

within the contract period, and was entitled to set off said recovery of $1240.00 pro tanto against the indebtedness of the National Construction Company to the International Steel & Iron Company.

Thereupon the Chancellor adjudged and decreed that complainant International Steel & Iron Company recover of the defendants National Construction Company and National Surety Company the sum of $58,593.71 for which execution was awarded, and that defendants National Construction Company and National Surety Company pay seven-eighths of the cost of this cause, and the complainant International Steel & Iron Company pay one-eighth of the cost of the cause.

In said decree of October 25, 1932, the Chancellor also ordered and directed R. H. Baker, Commissioner of Highways and Public Works, to collect and pay into Court in this cause the penalty of the aforseaid "substitute refunding bond", to be credited on the judgment rendered against National Construction Company and National Surety Company.

On November 10, 1932, the National Surety Company filed a petition for a rehearing through which it insisted that a judgment should have been rendered against the Consolidated Indemnity Company, the surety on the "substitute refunding bond," for $40,000.00, the penalty of said bond.

[fol. 143] The Consolidated Indemnity Company, by answer filed on November 17, 1932, resisted the rehearing sought by National Surety Company; but, by decree entered on November 18, 1932, the Chancellor granted the prayer of the petition "to the extent prayed", and set aside the aforementioned order directing the Commissioner of Highways and Public Works to collect and pay the penalty of the "substitute refunding bond" into Court, and decreed "that the complainant have and recover of the National Construction Company and the Consolidated Indemnity Insurance Company the sum of $40,000.00 for which let execution issue, and when said sum is collected it shall be credited on the judgment rendered by the National Construction Company and the National Surety Company of $58,593.71.

The National Surety Company excepted to the decree rendering judgment against it for $58,593.71 and taxing it

with seven-eighths of the cost of the cause, and prayed an appeal therefrom to this Court, which appeal was granted by the Chancellor and perfected by the appellant.

There is no evidence in the "designated" record before us, other than the exhibits to pleadings which have been mentioned.

In this Court, the appellant has assigned errors as follows: (1) The Chancellor erred in not dismissing the suit as to National Surety Company; (2) the Chancellor erred [fol. 144] in rendering judgment against National Surety Company for $58,593.71; and (3) the Chancellor erred in not holding that the final settlement made by the Commissioner with the National Construction Company, on September 3, 1930, the release of the retainage, the acceptance of a new bond in place of the retainage, and the delivery of the bond in Court in response to the suit thereon, was a fulfillment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety."

As before stated herein, the defense interposed by appellant National Surety Company in its answer to the original bill was that the release of the "retainage" of $77,099.32 necessarily released and relieved it (National Surety Company) of any liability to the Department of Highways and Public Works and/or each and every claimant included in said refunding bond, one of which was the complainant International Steel & Iron Company.

The learned Chancellor held otherwise, for the reasons stated in that part of his decree hereinbefore copied.

The fundamental proposition upon which the argument of counsel in support of the decree is predicated, is (as we understand the brief and argument for appellee) embraced in an excerpt therefrom as follows:

[fol. 145] "Appellant entered into its bond with a full knowledge of the provisions of Chapter 80 of the Acts of 1929, and guaranteed that National Construction Company would pay off its obligations, knowing that the National Construction Company would have the right under the law to take down its retainage upon the execution of a refunding bond, pending the determination of the validity of any contested claim. In other words, National Surety Company obligated itself to pay any valid claim of appellee against the National Construction Company and entered into this

obligation knowing that the law permitted the Highway Commissioner to pay over the money during a pendency of the controversy of the National Construction Company if it executed a refunding bond that appeared satisfactory to the Commissioner, National Surety Company did not merely guarantee that the Highway Commissioner would retain a sufficient amount to pay the claim—it guaranteed and obligated itself to see that National Construction Company would pay the obligation to the International Steel & Iron Company in lawful money of the United States. Until such payment has been made it is clear that National Surety Company remains obligated under its bond. No [fol. 146] act of the Commissioner in handling the retainage, whether lawful or unlawful, which falls short of actual payment of the money, either to appellee or in Court for its benefit, could have the legal effect of satisfying the obligation of appellant's bonds."

The statement that "appellant entered into its bond with a full knowledge of the provisions of Chapter 80 of the Acts of 1929", and therefore knew "that the National Construction Company would have the right under the law to take down its retainage upon the execution of a refunding bond, pending the determination of the validity of any contested claim", involves an impossible assumption, for the reason that the Act of 1929, Chapter 80, was enacted more than a year after the bond here in question was executed by applicant Surety Company.

By its own terms the Act of 1929, Chapter 80 (which was "passed" April 10, 1929, and "approved" April 11, 1929) took effect "from and after its passage", and it contains no language which indicates a Legislative intent that it should have a retrospective operation.

It is a rule of statutory construction that all statutes are to be construed as having only a prospective operation, unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is neces- [fol. 147] sarily implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect. Heiskall v. Lowe, 126 Tenn. 475, 491, 153 S. W. 284; Black on Interpretation of Laws, 2nd Ed., page 385; Wade v. Madding, 161 Tenn. 88, 105, 28 S. W. (2nd) 642.

In an article on "Statutes and Statutory Construction" found in Vol. 1 of the Federal Statutes Annotated (page 54, sec. 37, note 14), a large number of cases are cited in support of the statement that "retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature."

In Black on Interpretation of Laws, supra (page 386-388), it is said:

"The reason for this rule is the general tendency to regard retrospective laws as dangerous to liberty and private rights, on account of their liability to unsettle vested rights or disturb the legal effect of prior transactions. * * * While it is true as stated in the preceding section, that many statutes would be unconstitutional if given a retrospective application, and that the endeavor will be made to void this effect by construction, yet the general rule now [fol. 148] under consideration does not depend upon the question of constitutionality or unconstitutionality in the particular case. Independently of the organic law—that is, even in cases where a retrospective construction would not make the statute obnoxious to any constitutional provision—it will not be so construed, except in the case of a purely remedial law, unless the Legislative intention in that regard is perfectly plain."

With respect to the rule stated in the text last quoted, our Supreme Court (in the case of Hannum v. Bank, 1 Cold. 398, 402, has said:

"This doctrine has been adhered to generally and steadfastly in England, and it is to be found incorporated as a fundamental principle in the jurisprudence of the most enlightened and civilized States, ancient and modern; and this by force of its intrinsic reason and justice, and not because of any positive constitutional prohibition to the contrary.

The principle has likewise been adhered to in this country with great uniformity of decision. See Sedgw. on Stat. & Const. Law, 188, 406; 7 Johns, 477; 3 Dall. 391, and cases referred to. And the soundness of this principle of inter- [fol. 149] pretation is sufficiently supported by the most

obvious principles of reason and justice wherever past contracts or vested rights are involved, aside from any positive restrictions imposed by the State and Federal Constitutions.

It is repugnant to every man's common sense and reason, and sense of justice, that a contract or promise sanctioned by the existing law, and vesting the parties with positive legal rights when made, should be annulled and rendered inoperative by a subsequent law."

The Act of 1929, Chapter 80, is an amendment to Chapter 74 of the Public Acts of 1917, but this does not take it out of the general rule just stated.

"An amendatory statute, like other Legislative Acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied. * * * With respect to rights accrued and contracts made under and by virtue of the old statute, it will not be understood (unless the Legislature plainly so wills it) that they are to be abrogated or modified by the amending Act, but, on the [fol. 150] contrary, the old law remains in force so far as necessary for their vindication and enforcement." Black on Interpretation of Laws, 2nd Ed., pp. 584-585. See also, for the rule that amendatory statute applies only to things done after its passage, Hannum v. McInturff, 6 Baxt 225; Noll & Thompson v. Railroad, 112 Tenn. 140, 146, 79 S. W. 380; Coke & Coal Co. v. Steel Co., 123 Tenn. 428, 439, 131 S. W. 988, 31 LRANS 278.

For the reasons stated, we are of the opinion that the Act of 1929, Chapter 80, is inapplicable to the present controversy.

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which effect its validity, construction, discharge and enforcement." Walker v. Whitehead, 83 U. S. 314, 21 L. Ed. 357, 358. Acc. Hannum v. McInturff, supra, page 230; Hannum v. Bank, supra, page 403.

This brings us to a consideration of certain provisions of Chapter 74, Public Acts of 1917, which were in force and

operative with respect to highway contracts and bonds to secure their performance at the time of the execution, in March 1928, of the contract and bond involved in this case.

The provisions of the Act of 1917, Chapter 74, directly [fol. 151] pertinent to the present controversy, are found in Section 6 thereof, and are as follows:

"All contractors with whom contracts are made by the Department shall enter into good and solvent surety bond in an amount fixed by the Department, conditioned upon the full and faithful performance of every part and stipulation of the contract, especially the payment for all materials purchased and for all labor employed in the contemplated work. This bond must be approved by the Department and filed with its records. The contract shall provide that the work executed thereunder shall be subject to the inspection, approval, and acceptance of the State Highway Engineer or his assistant engineer acting on oath and under bond. Not more than ninety per cent of the contract price shall be paid on any contract until it is completed and the work is accepted. Before final acceptance, the contractor must furnish evidence to satisfy the Department that all the material used by him, his sub-contractors, or his agents, has been fully paid for and all laborers and other employees working for him, his sub-contractors, or his agents, have been fully paid. When this is done, full settlement may be made with the contractor; but not until thirty days [fol. 152] notice in some newspaper published in the County where the work is done, if there be a newspaper published there, and if not, in a newspaper in an adjoining County, that settlement is about to be made and notify all claimants to file notice of their claim with the Secretary of the Department. The Secretary of the Department shall withhold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some court of competent jurisdiction."

It is seen that, under the above quoted provisions of the Act of 1917, Chapter 74, it was the duty of the Secretary of the Department of Highways and Public Works (the Commissioner since the "Reorganization Act" of 1923, Chapter 7) to withhold a sufficient sum from the contract

price due to pay all claims, including advertising, of which notice was filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent, in some Court of competent jurisdiction. But, notwithstanding the statutory requirement just mentioned, the Commissioner, after due and seasonable notice of claims for materials and labor used on the Project, [fol. 153] aggregating slightly more than $69,000.00 (and including the claim of complainant International Steel & Iron Company), paid to the contractor, National Construction Company, the full sum due on the contract, viz: $77,099.32, without waiting "a reasonable time", or any time, "to allow claimants to sue for and prove their claims against the contractor or his agent, in some Court of competent jurisdiction."

The Commissioner assumed to act (in thus paying over the "retainage" to the contractor, National Construction Company) under Chapter 80 of the Public Acts of 1929, which amends the Act of 1917, Chapter 74, Section 6, by striking out the provision that, "the Secretary of the Department shall withold a sufficient sum from the contract price due to pay all claims, including advertising, of which notice is filed with him, for a reasonable time to allow claimants to sue for and prove their claims against the contractor or his agent in some Court of competent jurisdiction", and substituting therefor, among others, provisions as follows:

"(a) 'The Secretary of the Department (now the Commissioner of Highways and Public Works) shall withhold a sufficient sum from the contract price due to pay all claims, of which notice is filed with him, for a period of sixty days from the date of the last advertising, to allow [fol. 154] claimants to sue and prove their claims against the contractor or his agent, in some Court of competent jurisdiction. In the event suit is brought against the contractor within the sixty days from the date of the last advertising, by any claimant, the Department or its officers shall pay the amount of said claim into Court. But in all cases where suits are not brought within the said period of sixty days the Secretary shall pay said sum or sums so withheld to the contractor.

(b) 'On the date set for full and final settlement with the contractor, the contractor may make proper refunding bond

to the State of Tennessee for the amount of any sum or sums so held for the said period of sixty days, such bond to be approved by the Commission; whereupon the Commissioner or the Department of Highways and Public Works shall pay such contractor in full.

(c) 'All suits against contractors brought by any claimant shall make the Commissioner of Highways and Public Works a defendant thereto and, except where the same be for sums within the jurisdiction of a Justice of the Peace, shall be brought in the County where the main office of the Department of Highways and Public Works is situated. [fol. 155] On any such suit being brought the sums then withheld may be paid into Court, as above provided, by simple petition of the Commissioner which may be substantially as follows:

'Your petitioner, the Commissioner of Highways and Public Works, respectfully represents that under Chapter 74 of the Public Acts of 1917, and acts amendatory thereof, he has retained from (here insert name of contractor) on final estimate or settlement, $——, equal in amount to the claim of (here insert name of claimant), as the same was filed and presented to the Department of Highways and Public Works, a copy or photostatic copy of which is hereto attached, and, therefore, as authorized by law to do, suit having been brought by the claimant, your petitioner pays said sum to the Clerk of the Court, by voucher or warrant No. ——, dated —— — ——, payable to the order of said Clerk for $——, drawn against the funds of said Department of Highways and Public Works, accompanying this petition, and your petitioner prays that the cause be dismissed as to him, this payment being in the nature of and for the purpose of an interpleader.'

(d) 'Such petition shall be signed by the Commissioner or the attorney for the Department of Highways and Public Works for him, and upon the filing of such petition ac- [fol. 156] companied by such payment the suit shall be dismissed as to the Commissioner as a matter of right, such sums so paid into Court, as to the plaintiff or claimant, standing in lieu and as a satisfaction of the contractor's bond and a fulfillment of the duties of the Department of Highways and Public Works to the claimant or plaintiff.''

But, as we have held, the said Act of 1929 was not retroactive in its effect, and afford no authority to the Com-

missioner to make such payment to the contractor, National Construction Company.

It does not appear from the record that such payment to the National Construction Company was made with the consent or knowledge of the National Surety Company. Was the National Surety Company thereby discharged from liability on its bond?

The rule of strictissimi juris, applicable to an ordinary accommodation surety, is not available to a paid surety on a bond such as that here under consideration. The Courts regard such contract more in the nature of an insurance contract, and by analogy apply rules governing liability applicable to the latter class of contracts. L. & N. R. Co. v. U. S. F. & G. Co., 125 Tenn. 658, 148 S. W. 671; Hunter v. U. S. F. & G. Co., 129 Tenn, 572, 167 S. W. 692; Green v. U. S. F. & G. Co., 135 Tenn. 117, 185 S. W. 726; Cambria Coal Co. v. National Surety Co., 141 Tenn. 270, 209 S. W. 641; Rambo v. Naylor Engineering Co., 10 Tenn. App. 203, [fol. 157] 206; Couch on Insurance, Vol. 5, sec. 1189; Annotation, 12 ALR, p. 382 et seq.

But "the Court will not extend the contract beyond its import nor undertake to make any new contract for the parties" (Rambo v. Naylor Engineering Co., supra), and "this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties." Green v. Fidelity & Guaranty Co., 135 Tenn. 117, 122, 185 S. W. 726.

In such case, the plain intention of the parties cannot be "nullified by construction, or the sureties obligation extended by implication beyond the express terms of his contract." 5 Couch, supra, pp. 4263-4264. See also Annotation, 12 ALR, pp. 387-389, where cases illustrating the "qualification of the rule" are digested.

The provision of the Act of 1917, Chapter 74, hereinbefore quoted, which required the Commissioner to withhold a sufficient sum to pay all claims of which notice was filed with him etc., constituted a part of the contract and bond here in question (see authorities hereinbefore cited), and this provision was not for the benefit of laborers and furnishers of material and the Highway Department alone, but also enured to the benefit of the surety on the contractor's bond, and could not be changed to the prejudice of the surety without its consent. Fidelity & Deposit Co.

[fol. 158] v. Agnew, (C. C. A.), 152 Fed. 955; O'Neill v. Title Guaranty & Trust Co. (C. C. A.), 191 Fed. 570; Justice v. Empire State Surety Co., 209 Fed. 105, 108, and 218 Fed. 802; Joint School District v. Bailey-Marsh Co., 181 Wis. 202; Shelton v. American Surety Co. (U. S. Dist Ct.), 127 Fed. 736; First National Bank of Montgomery v. Fidelity & Deposit Company of Maryland (Ala.), 5 LRANS 418, and Case Note thereto appended.

(It should be observed that the case of Fidelity & Deposit Company v. Robertson, 136 Ala. 379, 34 Sou. 933, holding that such a provision in the contract was solely for the owner's benefit, and could be waived by him without prejudice to his rights against the surety, was expressly overruled by the later case of First Nat. Bank v. Fid. & Dep. Co., supra).

In Fidelity & Deposit Co. v. Agnew, supra, page 956, the U. S. Circuit Court of Appeals said:

"The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract becomes a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge [fol. 159] as a matter of law. (Citing authorities). This is too well established to be controverted, and the only question is how far it applies here." (The judgment of the District Court against the surety was reversed).

In the case of Joint School District v. Bailey-Marsh Co., supra, the Supreme Court of Wisconsin said:

"It is well settled that whenver a creditor has a right and opportunity to apply property of the principal to the satisfaction or security of his debt, he owes to the surety a duty to do so, and release or waiver of that right to the prejudice of the surety and without his consent will discharge the surety, at least pro tanto."

In that case the Court held that where a bond is given for a money consideration it has all the essential features of an insurance contract and is therefore not to be construed according to the rules of law applicable to the contract of an ordinary accommodation surety, but that the

right to have the building fund applied to the completion of the building after the contractor's default and not diverted to the payment of the contractor's obligations to general creditors is one which may be asserted by a surety for compensation as well as by a gratuitous surety, and that, where there had been such diversion, the surety was discharged pro tanto.

[fol. 160] We think that the principles declared and applied in the Wisconsin case, just mentioned, are sound, and that their application to the facts of the present case results in a discharge of the appellant from liability on the bond executed by it as surety for National Construction Company.

The briefs and arguments in the instant case are largely devoted to a discussion of the construction and effect of Chapter 80 of the Public Acts of 1929, but, in the view we have taken of the case, this discussion is not relevant to the determinative question hereinbefore pointed out.

The Act of 1929, Chapter 80, has been construed and applied by our Supreme Court in several reported cases, viz: Equitable Casualty & Surety Co. v. Jackson, 163 Tenn. 54, 44 S. W. (2nd) 899; Moss Tie Co. v. Newsom, 164 Tenn. 515, 51 S. W. (2nd) 477; Petroleum Corporation v. McQuary, 164 Tenn. 646, 51 S. W. (2nd) 854; Standard Oil Company of La. v. Jamison Bros., Inc., 59 S. W. (2nd) 522; Campbell v. Cresap, 59 S. W. (2nd) 523; but it does not appear from the opinion in either of these cases that a bond executed prior to the passage of the Act was involved.

In the leading case of Southern Construction Co. v. Halliburton, 149 Tenn. 319, 258 S. W. 409, the Act of 1917, Chapter 74, was construed in many of its aspects, but the question presented in the instant case (relating to the construction and effect of Section 6 of that Act) was not dis-
[fol. 161] cussed or involved in the Halliburton case.

It results that the decree of the Chancellor granting a recovery in favor of complainant International Steel & Iron Company, and against appellant National Surety Company, for $58,593.71 and costs, is reversed, and the complainant's bill, as against National Surety Company, is dismissed, and a decree will be entered accordingly.

The costs of the appeal will be adjudged against the appellee International Steel & Iron Company and its sureties for costs.

Faw, P. J.

Judges Crownover and DeWitt concur.

[fol. 162] IN COURT OF APPEALS OF TENNESSEE

Davidson Equity
Rev. and Dis.

INTERNATIONAL STEEL & IRON COMPANY

vs.

NATIONAL CONSTRUCTION CO. ET AL.

DECREE—December 2, 1933

This cause came on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that decree of the Chancellor be reversed, and the bill dismissed as against the National Surety Company, and that the International Steel and Iron Co., principal and Louis Leftwich and Cecil Sims, surety, will pay the costs of this cause, for which let fi fa issue.

[fol. 163] IN SUPREME COURT OF TENNESSEE

ORDER ALLOWING CERTIORARI—May 19, 1934

The Court granted petitions for certiorari in the following cases, to wit:

International Steel and Iron Co. v. National Const. Co. et al., Davidson Eq. Both petitions Granted.

[fol. 164] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENTS OF ERROR IN BEHALF OF NATIONAL SURETY COMPANY—Filed Feb. 14, 1934

[fol. 165] I

The Court of Appeals erred in holding that the Act of 1929, Chapter 80, was inapplicable to the present contro-

versy and in holding that the Commissioner of Highways and Public Works was not authorized to proceed under the provisions of said Act, on September 3, 1930, in making a final settlement to release the retainage and accept a proper refunding bond for the protection of unpaid claims of laborers and materialmen.

(Opinion, Court of Appeals, p. 16.)

II

The Court of Appeals erred in not directly sustaining petitioner's third assignment of error, viz:

"The Chancellor erred in not holding that the final settlement made by the Commissioner with the National Construction Company, on September 3, 1930, the release of the retainage, and the delivery of the bond in place of the retainage, and the delivery of the bond in Court in response to the suit thereon, was a fulfillment of the duties of the Commissioner and a satisfaction and discharge of the contractor's first bond on which the National Surety Company was surety."

(Opinion, Court of Appeals, p. 16.)

[fol. 166] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENTS OF ERROR IN BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY—Filed Jan. 4, 1934

[fol. 167] The Court of Appeals erred in holding that the action of the Commissioner of Highways and Public Works in payment over to the National Construction Company the retained funds aggregating $77,069.82 on September 3, 1930, and taking a refunding bond released and discharged the National Surety Company as a general surety on said contractor's bond for all liability thereunder to furnishers of material and labor used in the building of said bridge, and in reversing the judgment of the Chancellor and dismissing the suit as to the defendant, National Surety Company.

[fol. 168] IN SUPREME COURT OF TENNESSEE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 10, 1935

To the Clerk of the Supreme Court of Tennessee:

You are requested by appellant, International Steel and Iron Company, to incorporate in the transcript of the record in the above styled cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above styled cause upon petition of International Steel and Iron Company the following:

1. The opinion of the Supreme Court of Tennessee rendered April 6th, 1935, including dissenting opinion.

2. The final decree of the Supreme Court of Tennessee dated April 6th, 1935, and all subsequent orders giving their dates, relating to this case.

3. Petition for appeal to the Supreme Court of the United States and endorsements thereon.

[fol. 169] 4. Assignments of error accompanying said petition for appeal.

5. Statement of appellant as to jurisdiction of the Supreme Court of the United States as provided by Rule 12 of said Court.

6. Order allowing appeal.

7. Appeal bond and endorsements thereon.

8. Notice to counsel for appellee of the filing of appeal papers required by Rule 12, paragraph 2, Rules of the Supreme Court of the United States, including service, or acknowledgment of service.

9. Citation with acknowledgment of service thereon.

10. Original bill of International Steel and Iron Company filed in Chancery Court at Nashville, Tennessee, on September 12, 1930, and Exhibit A thereto.

11. Petition of R. H. Baker, Commissioner, filed in said cause in the Chancery Court at Nashville, Tennessee, on October 4, 1930, with Exhibits A, B and C thereto.

12. Answer and cross-bill of National Construction Company filed in said cause in the Chancery Court at Nashville, Tennessee, on May 19, 1931.

13. Answer of National Surety Company filed in said cause in Chancery Court at Nashville, Tennessee, on October 29, 1931.

14. Answer of International Steel and Iron Company to the cross-bill of National Construction Company filed in said cause in Chancery Court at Nashville, Tennessee, on [fol. 170] July 6, 1931.

15. Decree in said cause rendered by the Chancery Court at Nashville on January 27, 1932, in Minute Book 25, Page 297.

16. Decree in said cause rendered by the Chancery Court at Nashville on October 25, 1932, in Minute Book 26, Page 332.

17. Decree in said cause rendered by the Chancery Court at Nashville on November 18, 1932, in Minute Book 26, Page 404.

18. Assignments of error filed by National Surety Company in the Court of Appeals on March 23, 1933.

19. Appeal bond of National Surety Company filed December 16, 1932.

20. Opinion of the Court of Appeals filed December 2, 1933.

21. Minutes of the Court of Appeals containing its final decree, dated December 2, 1933.

22. Minutes of the Supreme Court of Tennessee granting the petition for certiorari dated the 19th day of May, 1934.

23. Assignments of error filed by National Surety Company in the Supreme Court of Tennessee on the 14th day of February, 1934.

24. Assignments of error filed by International Steel and Iron Company on the 4th day of January, 1934.

[fol. 171] 25. This præcipe.

26. Clerk's certificate and certificate of the Chief Justice of the Supreme Court of Tennessee.

International Steel and Iron Company, F. M. Bass, Louis Leftwich, by Cecil Sims, Counsel.

[File endorsement omitted.]

I, William Hume, Counsel for National Surety Company, appellee, acknowledge service of this præcipe on this June —, 1935. I agree that it embraces everything that need be transmitted from the Supreme Court of the State of Tennessee to the Supreme Court of the United States in this cause and I agree with counsel for appellant that all the record so transmitted should be printed.

William Hume, Counsel for Appellee.

[fol. 172] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 173] Judge's certificate to clerk omitted in printing.

[fol. 174] Clerk's certificate to judge omitted in printing.

[fol. 175] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 15, 1935

Comes now International Steel and Iron Company, appellant in the above styled cause, conformably to the Rules of the Supreme Court of the United States, and particularly Rule 13 thereof, and adopts its assignments of errors as the statement of the points to be relied upon.

And International Steel and Iron Company, appellant, further states that all the record as filed in this cause in the Supreme Court of the United States should be printed, including this statement.

This June 10th, 1935.

F. M. Bass, Louis Leftwich, Cecil Sims, Counsel for Appellant.

[fol. 176] I, William Hume, counsel for appellee, National Surety Company, acknowledge service of the above on this the 10th day of June, 1935, and I concur in the suggestion that the entire record as filed in the Supreme Court of the United States should be printed for the consideration of that Court.

William Hume, Counsel for Appellee.

[fol. 177] [File endorsement omitted.]

Endorsed on cover: File No. 39,806. Tennessee Supreme Court. Term No. 252. International Steel and Iron Company, Appellant, vs. National Surety Company. Filed July 15, 1935. Term No. 252 O. T. 1935.